

MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)  
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By: Rebecca A. Archer, Deputy (SBN 202743)  
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Attorneys for Defendants  
COUNTY OF SAN MATEO and ROBERT FOUCRAULT,  
individually and as CORONER, SAN MATEO COUNTY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ISOLINA PICON,

Plaintiff,

vs.

COUNTY OF SAN MATEO and ROBERT  
FOUCRAULT, individually and as CORONER, SAN  
MATEO COUNTY,

Defendants.

Case No. 08 00766-JCS

**SUPPLEMENT TO THE NOTICE OF  
REMOVAL**

Because defendant inadvertently omitted a document in its Notice of Removal filed on January 31, 2008, defendant hereby supplement Exhibit A to include that document. For ease of reference, Exhibit A, as supplemented, is hereby resubmitted in its entirety.

Dated: February 7, 2008

MICHAEL P. MURPHY, COUNTY COUNSEL

By: \_\_\_\_\_/s/  
John D. Nibbelin, Deputy

Attorneys for Defendants  
COUNTY OF SAN MATEO and ROBERT  
FOUCRAULT, individually and as CORONER,  
SAN MATEO COUNTY



# SUMMONS (CITACION JUDICIAL)

NOTICE TO DEFENDANT:  
(AVISO AL DEMANDADO): County of San Mateo

YOU ARE BEING SUED BY PLAINTIFF:  
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

Isolina Picon

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

**ENDORSED FILED**  
**SAN MATEO COUNTY**

OCT 24 2007

Clerk of the Superior Court  
By R. Montgomery  
DEPUTY CLERK

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association.

*Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.*

*Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)) o poniéndose en contacto con la corte o el colegio de abogados locales.*

The name and address of the court is: Superior Court San Mateo  
(El nombre y dirección de la corte es): 400 County Center  
Redwood City, CA 94603

CASE NUMBER  
(Número del Caso):

**CV 4 6 7 1 6 1**

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:  
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Ayanna L. Jenkins Toney (415) 464-4974  
225 Bush Street, 16th Floor  
San Francisco, CA 94104  
DATE: October 24, 2007  
(Fecha)

**JOHN C. FITTON**

Clerk, by  
(Secretario)

**R. MONTGOMERY**

Deputy  
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)  
(Para prueba de servicio de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

- ☐ as an individual defendant.
- ☐ as the person sued under the fictitious name of (specify):  
County of San Mateo

- ☒ on behalf of (specify): **COUNTY OF SAN MATEO**

- under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)  
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)  
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)

- ☒ other (specify): **PUBLIC ENTITY**
- ☐ by personal delivery on (date):

[SEAL]

Ayanna L. Jenkins-Toney (SBN 224847)  
LAW OFFICES OF AYANNA L. JENKINS-TONEY  
225 Bush Street,  
16<sup>th</sup> Floor  
San Francisco, CA 94901  
Telephone: (415) 464- 4974  
Facsimile: (415) 464- 4975

Attorneys for Plaintiff ISOLINA PICON

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON,

Plaintiff,

vs.

SAN MATEO COUNTY, a  
governmental entity; ROBERT  
FOUCRAULT, and individual,  
and as Coroner; and DOES 1-100,

Defendants.

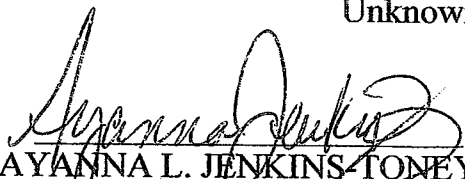
Case No. CIV 467161

PLAINTIFF'S STATEMENT OF  
DAMAGES

Plaintiff ISOLINA PICON submits his statement of damages as follows:

1. Health care expenses (to date, estimated): \$ 20,000
2. Health care expenses (future): Unknown
3. Lost income (to date, estimated): Unknown
4. Future lost income/loss of earning capacity: Unknown
5. Property damage: Unknown
6. General damages (to date, estimated): \$ 10,000,000
7. General damages (future): Unknown

Dated: OCTOBER 30, 2007

  
AYANNA L. JENKINS-TONEY  
Attorney for Plaintiff ISOLINA PICON

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): <b>AYANNA L. JENKINS-TONEY,</b> CSB # 224847 225 BUSH STREET, 16 TH FLOOR SAN FRANCISCO, CA 94104  TELEPHONE NO: (415)464-4974 FAX NO. (Optional): (415)464-4975 E-MAIL ADDRESS (Optional): AYANNAJ@MSN.COM ATTORNEY FOR (Name): ISOLINA PICON	FOR COURT USE ONLY   <b>ENDORSED FILED</b> <b>SAN MATEO COUNTY</b>  OCT 24 2007 Clerk of the Superior Court By <u>R. Montgomery</u> DEPUTY CLERK
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO</b> STREET ADDRESS: 400 COUNTY CENTER MAILING ADDRESS: SAME CITY AND ZIP CODE: REDWOOD CITY, 94603-1655 BRANCH NAME: RED WOOD CITY BRANCH	
PLAINTIFF: ISOLINA PICON  DEFENDANT: County of San Mateo; Robert Foucrault, individually and as Coroner, San Mateo County <input checked="" type="checkbox"/> DOES 1 TO 100	
<b>COMPLAINT—Personal Injury, Property Damage, Wrongful Death</b> <input type="checkbox"/> AMENDED (Number): Type (check all that apply): <input type="checkbox"/> MOTOR VEHICLE <input checked="" type="checkbox"/> OTHER (specify): <input checked="" type="checkbox"/> Property Damage <input type="checkbox"/> Wrongful Death <input checked="" type="checkbox"/> Personal Injury <input checked="" type="checkbox"/> Other Damages (specify): PUNITIVE	
<b>Jurisdiction (check all that apply):</b> <input type="checkbox"/> ACTION IS A LIMITED CIVIL CASE Amount demanded <input type="checkbox"/> does not exceed \$10,000 <input type="checkbox"/> exceeds \$10,000, but does not exceed \$25,000 <input checked="" type="checkbox"/> ACTION IS AN UNLIMITED CIVIL CASE (exceeds \$25,000) <input type="checkbox"/> ACTION IS RECLASSIFIED by this amended complaint <input type="checkbox"/> from limited to unlimited <input type="checkbox"/> from unlimited to limited	CASE NUMBER:  <div style="font-size: 24pt; font-weight: bold; text-align: center;">CIV 467161</div>

1. **Plaintiff (name or names):** ISOLINA PICON

alleges causes of action against **defendant (name or names):**

County of San Mateo; Robert Foucrault, individually and as Coroner, San Mateo County

2. This pleading, including attachments and exhibits, consists of the following number of pages: 17

3. Each plaintiff named above is a competent adult

a. ☐ **except plaintiff (name):**

(1) ☐ a corporation qualified to do business in California

(2) ☐ an unincorporated entity (describe):

(3) ☐ a public entity (describe):

(4) ☐ a minor ☐ an adult

(a) ☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed

(b) ☐ other (specify):

(5) ☐ other (specify):

b. ☐ **except plaintiff (name):**

(1) ☐ a corporation qualified to do business in California

(2) ☐ an unincorporated entity (describe):

(3) ☐ a public entity (describe):

(4) ☐ a minor ☐ an adult

(a) ☐ for whom a guardian or conservator of the estate or a guardian ad litem has been appointed

(b) ☐ other (specify):

(5) ☐ other (specify):

☐ Information about additional plaintiffs who are not competent adults is shown in Attachment 3.

SHORT TITLE:

PICON V. COUNTY OF SAN MATEO

CASE NUMBER:

4. ☐ Plaintiff (name):

is doing business under the fictitious name (specify):

and has complied with the fictitious business name laws.

5. Each defendant named above is a natural person

a. ☒ except defendant (name):(1) ☐ a business organization, form unknown(2) ☐ a corporation(3) ☐ an unincorporated entity (describe):(4) ☒ a public entity (describe):

County of San Mateo

(5) ☐ other (specify):c. ☐ except defendant (name):(1) ☐ a business organization, form unknown(2) ☐ a corporation(3) ☐ an unincorporated entity (describe):(4) ☐ a public entity (describe):(5) ☐ other (specify):b. ☐ except defendant (name):(1) ☐ a business organization, form unknown(2) ☐ a corporation(3) ☐ an unincorporated entity (describe):(4) ☐ a public entity (describe):(5) ☐ other (specify):d. ☐ except defendant (name):(1) ☐ a business organization, form unknown(2) ☐ a corporation(3) ☐ an unincorporated entity (describe):(4) ☐ a public entity (describe):(5) ☐ other (specify):☐ Information about additional defendants who are not natural persons is contained in Attachment 5.

6. The true names of defendants sued as Does are unknown to plaintiff.

a. ☒ Doe defendants (specify Doe numbers): 1-100 were the agents or employees of other named defendants and acted within the scope of that agency or employment.b. ☒ Doe defendants (specify Doe numbers): 1-100 are persons whose capacities are unknown to plaintiff.7. ☐ Defendants who are joined under Code of Civil Procedure section 382 are (names):

8. This court is the proper court because

a. ☒ at least one defendant now resides in its jurisdictional area.b. ☒ the principal place of business of a defendant corporation or unincorporated association is in its jurisdictional area.c. ☒ injury to person or damage to personal property occurred in its jurisdictional area.d. ☐ other (specify):9. ☒ Plaintiff is required to comply with a claims statute, anda. ☒ has complied with applicable claims statutes, orb. ☐ is excused from complying because (specify):

SHORT TITLE:

CASE NUMBER:

PICON V. COUNTY OF SAN MATEO

10. The following causes of action are attached and the statements above apply to each (each complaint must have one or more causes of action attached):

- a. ☐ Motor Vehicle
- b. ☐ General Negligence
- c. ☐ Intentional Tort
- d. ☐ Products Liability
- e. ☐ Premises Liability
- f. ☒ Other (specify):

1)Breach of Mandatory Duty; 2)Breach of the Right To Control The Disposition Of The Remains Of A Deceased Person; 3)Negligent Infliction Of Emotional Distress

11. Plaintiff has suffered

- a. ☐ wage loss
- b. ☐ loss of use of property
- c. ☒ hospital and medical expenses
- d. ☒ general damage
- e. ☒ property damage
- f. ☐ loss of earning capacity
- g. ☒ other damage (specify):

and will continue to suffer Severe Emotional Distress

12. ☐ The damages claimed for wrongful death and the relationships of plaintiff to the deceased are
- a. ☐ listed in Attachment 12.
  - b. ☐ as follows:

13. The relief sought in this complaint is within the jurisdiction of this court.

14. Plaintiff prays for judgment for costs of suit; for such relief as is fair, just, and equitable; and for

- a. (1) ☒ compensatory damages
- (2) ☒ punitive damages

The amount of damages is (in cases for personal injury or wrongful death, you must check (1)):

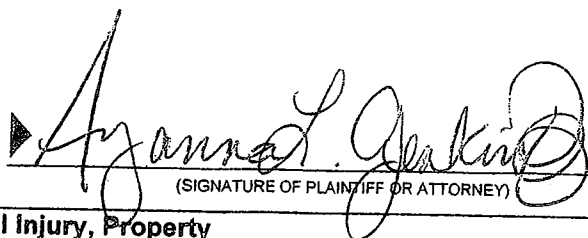
- (1) ☒ according to proof
- (2) ☐ in the amount of: \$

15. ☐ The paragraphs of this complaint alleged on information and belief are as follows (specify paragraph numbers):

Date: October 23, 2007

AYANNA L. JENKINS-TONEY

(TYPE OR PRINT NAME)



(SIGNATURE OF PLAINTIFF OR ATTORNEY)

SHORT TITLE: PICON V. COUNTY OF SAN MATEO

CASE NUMBER:

## FIRST CAUSE OF ACTION

DENIAL OF QUASI-PROPERTY RIGHT  
THE RIGHT TO CONTROL THE DISPOSITION OF THE REMAINS OF A  
DECEASED PERSON

Plaintiff Isolina Picon is the mother of Nicholas Picon, born October 6, 1983.

On October 25, 2006 Nicholas Picon died of natural causes.

On October 26, 2006 the Coroner's office of the County of San Mateo conducted an autopsy on the remains of Nicholas Picon. The Coroner's autopsy report is attached to this complaint as Exhibit A.

On the same day October 26, 2006, the cause of death was determined to be due to a congenital heart defect.

On October 26, 2006 an official or officials of the San Mateo County Coroner's office made the unilateral decision to retain the entire heart organ of the decedent Nicholas Picon without any attempt to notify his next of kin.

On October 30, 2006 the plaintiff had a funeral for her son Nicholas Picon in order to bury and lay to rest what she thought at the time was his intact remains.

On November 13, 2006 the plaintiff learned for the first time that her son's heart was retained by the Coroner's office of the County of San Mateo.

The plaintiff was denied the right to bury her son at the time chosen by the decedent's family.

The knowledge of the theft coupled with the grief she was enduring after the death of her son has caused and will continue to cause the plaintiff damage.

(Required for verified pleading) The items on this page stated on information and belief are (specify item numbers, not line numbers):

This page may be used with any Judicial Council form or any other paper filed with the court.

Page 4

SHORT TITLE: PICON V. COUNTY OF SAN MATEO

CASE NUMBER:

## SECOND CAUSE OF ACTION

## BREACH OF MANDATORY DUTY GOVERNMENT CODE § 815.6

On October 25, 2006 Nicholas Picon died in his home of natural causes.

On October 26, 2006 the Coroner's office of the County of San Mateo conducted an autopsy on the remains of Nicholas Picon.

On October 26, 2006, the Coroner's office of the County of San Mateo retained the heart of the decedent Nicholas Picon. The Coroner's office retained the entire organ without any attempt to notify the decedent's relatives. The Coroner's office retained the entire heart despite the fact that the cause of death had been determined as being intramural tunneling, which is a congenital heart defect. The cause of death was given to the plaintiff on October 26, 2006 at the conclusion of the autopsy.

On November 13, 2006 two weeks after what the plaintiff believed was the burial of her son, she found out that the Coroner's office had retained her son's entire heart organ. The plaintiff was told initially that the heart had been sent to Stanford University for research purposes. When the plaintiff was given this information, in addition to being completely shocked, dismayed and outraged, she questioned the rights of the Coroner to give away or sell her son's entire heart without her permission. She was told that the law did not require her permission to retain the organ. After being told that her son's heart was not with his body when he was buried the plaintiff began what could only be categorized as a crusade to regain possession of her son's heart. The plaintiff was ultimately successful in doing so on November 21, 2006. The agony she felt from the sudden death of her son was inextricably exacerbated upon stumbling on the knowledge that his body was not intact at burial. The fact is that the defendants literally stole the heart of the decedent Nicolas Picon.

In doing so the defendants and each of them breached their mandatory duty owed to plaintiff within the meaning of Government Code Section 815. 6. This duty was breached when the County Coroner retained the heart of the decedent and failed to comply with applicable rules, including but not limited to the rules set forth in California Government Code Sections 27491.4 (a) and 27491.45 (a) (2), and Health and Safety Code Section 7150, et reg.

The breach of the mandatory duty owed to plaintiff caused her direct injury and she has suffered and will continue to suffer severe emotional distress.

(Required for verified pleading) The items on this page stated on information and belief are (specify item numbers, not line numbers):

This page may be used with any Judicial Council form or any other paper filed with the court.

Page 5

SHORT TITLE: PICON V. COUNTY OF SAN MATEO

CASE NUMBER:

## THIRD CAUSE OF ACTION

## NEGLIGENCT INFLICTION OF EMOTIONAL DISTRESS

On October 26, 2006 the San Mateo County Coroner's office conducted an autopsy on the remains of Nicholas Picon.

At some point during the autopsy or at the conclusion of the autopsy the Coroner made the decision to remove and retain the entire heart organ of the decedent without prior consent, notification, or permission by the next of kin.

The Coroner in his official capacity had a duty owed to the plaintiff as next of kin.

The duty began when the Coroner took possession of the remains of the decedent.

This duty was breached when the remains were returned to the plaintiff without the heart organ.

The Coroner knew or should have known that the failure to return the heart was a breach of his obligations to plaintiff and would likely cause plaintiff to suffer emotional distress.

(Required for verified pleading) The items on this page stated on information and belief are (specify item numbers, **not** line numbers):

This page may be used with any Judicial Council form or any other paper filed with the court.

Page 6

SHORT TITLE:  
PICON V. COUNTY OF SAN MATEO

CASE NUMBER:

## Exemplary Damages Attachment

Page 7

ATTACHMENT TO ☒ Complaint ☐ Cross - Complaint

EX-1. As additional damages against defendant (name):

ROBERT FOUCRAULT individually and as Coroner San Mateo

Plaintiff alleges defendant was guilty of

- ☒ malice  
☒ fraud  
☒ oppression

as defined in Civil Code section 3294, and plaintiff should recover, in addition to actual damages, damages to make an example of and to punish defendant.

EX-2. The facts supporting plaintiff's claim are as follows:

This Exemplary Damages Attachment incorporates each of the preceding causes of action not negligence as though set forth in full.

On October 26, 2006 the San Mateo county coroner's office conducted an autopsy on Nicholas Picon. Nicholas Picon was the natural born son of the plaintiff Isolina Picon.

On October 26, 2006, the Coroner's office of San Mateo County told the plaintiff that the remains of her son Nicholas Picon were released to the funeral home.

On October 30, 2006, plaintiff buried what she thought was the intact remains of her son Nicholas Picon.

On November 13, 2006, plaintiff found out that she had not buried her son's body intact. The same day plaintiff requested an autopsy report.

On November 14, 2006, plaintiff went to the district attorney's office in person to report the theft of her son's heart.

On November 16, 2006, plaintiff was informed that the coroner had the legal rights to the heart that the law vested the authority in the Coroner solely to determine the disposition of deceased remains.

Only after repeated phone calls and pleas for the return of her son's heart did the plaintiff regain possession of the heart on November 21, 2006, at 5:30 pm.

Plaintiff was misled to believe that she had been given her son's remains. Plaintiff was intentionally misinformed by the county coroner and county counsel about the law as it pertains to organ retention. Plaintiff was forced to make repeated attempts to regain custody of her son's stolen heart through numerous pleas and calls.

The Coroner's office intentionally released the plundered body of Nicholas Picon to the funeral home without notifying the next of kin that the entire heart organ was retained.

The plaintiff was reduced to daily begging from November 13 - November 21, 2006, the time period between the knowledge of the theft and the recovery of the heart organ.

Plaintiff was repeatedly and callously, rebuffed, turned away, and given false information during the aforementioned time period.

EX-3. The amount of exemplary damages sought is

- a. ☒ not shown, pursuant to Code of Civil Procedure section 425.10.  
b. ☐ \$

PLAINTIFF/PETITIONER: Isolina Picon	CASE NUMBER:
DEFENDANT/RESPONDENT: County of San Mateo; Robert Foucrault	

**DECLARATION**

*(This form must be attached to another form or court paper before it can be filed in court.)*

**VERIFICATION**

I, Isolina Picon hereby declare, that my son Nicholas Picon died in our home on October 25, 2006. I was informed on October 26, 2006 that my son died of a congenital heart defect called intramural tunneling of the heart I was given this information by the San Mateo Coroner's office at the conclusion of his autopsy. I buried what I believed at the time to be the intact remains of my son on October 30, 2006. The funeral gave me a sense of purpose in that I was honoring my sons' remains and laying him to rest. It was the start of what I thought at the time to be the process of closure.

I was heartbroken at the loss of my son but I knew that I had to be strong for my family especially my husband and my daughter. I reasoned that due to that fact that my son died of natural causes in his own home that while tragic it was as peaceful a way to depart this earth as I could imagine otherwise.

I began to cope with my grief by seeking out my sons' friends and others who had suffered similar loss. It was during this search for answers and guidance that I stumbled upon the gross discovery that the San Mateo County Coroner's office had unbeknownst to me "stolen" the heart of my son, literally taking it from his body. This news completely rocked me to the core. It literally brought me to my knees. It destroyed me. I have not been the same person since finding out this information. As if finding out the information could have been any worse I was then forced to quite literally "beg" and plead with the San Mateo County Chief Deputy Coroner Thomas Marriscolo to return my sons heart to me. I cried. I pleaded with him and he keep telling me that I could not have my son's heart back. He told me that it had been sent to Stanford University for studying, he told me that I could not have it for health and safety reasons, he told me that I would have to pay to have my sons body exhumed and have the heart put back with the rest of his remains. He very coldly said that I could not have my son's heart back and that he would not speak to me again until he spoke with County counsel and then he hung up the phone abruptly in my face!

Still I begged, still I pleaded and finally on November 21, 2006, over a week later my sons' heart the heart that I nurtured and grew in my own womb was returned to me. The entire ordeal has caused me to have nightmares about my sons' heart being ripped from his body, callously stored and other outrageous thoughts that I cannot even begin to describe.

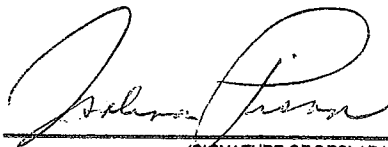
One of them being the fear that the heart that I was given is not my son's heart at all.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: October 23, 2007

Isolina Picon

(TYPE OR PRINT NAME)



(SIGNATURE OF DECLARANT)

☐ Attorney for    ☐ Plaintiff    ☐ Petitioner    ☐ Defendant  
☐ Respondent    ☒ Other (Specify):  
**PLAINTIFF**

# **EXHIBIT A**

SAN MATEO COUNTY CORONER'S OFFICE

PATHOLOGY REPORT

CASE No. 06-2533-A

NAME: PICON, Nicholas

SEX: Male

AGE: 23 years

Death Time & Date: Pronounced 1640 hours, 10-25-06

Time & Date of Exam: 0830 hours, 10-26-06

Autopsy Surgeon: Peter A. Benson, M.D., performed at San Mateo Medical Center,  
222 W. 39th Avenue, San Mateo, CA 94403

CAUSE OF DEATH

I. Disease or Condition directly leading to death:

A. Probable cardiac dysrhythmia

due to

B. Intramural tunneling of left anterior descending coronary artery

due to

C.

due to

D.

II. Other significant conditions contributing  
but not related to the immediate cause of death:

DIAGNOSES:

I. Intramural tunneling of left anterior descending coronary artery (also called  
myocardial coronary bridging - up to 5 mm deep over a 20 mm tunnel)

A. Focal fibrosis in right ventricular endocardium

B. Sudden collapse per scene investigation, consistent with cardiac  
dysrhythmia - moderate dilatation of right atrium

[Continued]

SEARCHED  
SERIALIZED  
INDEXED  
FILED  
TO ISOLINA PICON  
SAN MATEO COUNTY CORONER  
BY VJ DATE 11/27/06

SAN MATEO COUNTY CORONER'S OFFICE

AUTOPSY REPORT

NAME: PICON, Nicholas

CASE No. 06-2533-A

PROLOGUE: Written information available to the Forensic Pathologist prior to the autopsy is contained in a six-page Investigation Report by Investigator Gamble. Also received with the body is a digital photographic disk.

This autopsy begins in the Coroner's morgue at San Mateo Medical Center at 0830 hours and concludes at 1000 hours, Thursday, October 26, 2006. Assisting at the autopsy is Holly Benedict, Forensic Autopsy Technician.

IDENTIFICATION

An identification tag present on the right foot is signed by Investigator Gamble ("Nicholas Picon").

EXTERNAL EVIDENCE OF THERAPEUTICS AND/OR ATTEMPTED RESUSCITATION

Four EKG electrodes are present on the trunk.

There is a 3 mm long pale linear scar below and lateral to the left kneecap.

EXTERNAL EXAMINATION

Present on a gurney in the morgue, and wrapped in a white plastic wrap, is the supine body of a white/Hispanic adult male whose appearance is consistent with the given age of 23 years. The body measures 66 inches in length and weighs 132 pounds (the length and net weight are determined by Holly Benedict, Forensic Autopsy Technician).

Clothing: None. The body is nude.

There is full rigor mortis. Postmortem lividity is noted in the posterior portions of the body.

San Mateo County Coroner's Office  
PICON, Nicholas  
Autopsy Report, Case No. 06-2533-A

On the face is a coating of white soap or lotion, now dried, located on the nose, cheeks, and chin. On the scalp is straight, black hair measuring up to 6 inches in length. On the face are a trimmed beard and moustache with the hairs measuring approximately 1/2 inch in length. The sclerae are white and irides are brown. The pupils are round and equal and each measures 5 mm in diameter. Rare bulbar conjunctival petechiae are seen bilaterally, but no petechiae are seen in the palpebral conjunctival surfaces, or the facial skin. No tache noire is seen on the bulbar surfaces. The jaws show natural teeth, the biting edges of which are separated approximately 1/2 inch apart. No bite marks are seen in the lips or anterior visible tongue. The nasal septum is grossly normal. The oral cavity is free of fluid or foreign material. The hard palate is noted to have a high arch. The earlobes are unremarkable. The trachea is in the midline. The chest hair is scanty but appears shaved. The abdomen is flat. No surgical scars are seen on the abdomen. The penis is uncircumcised. The testes are present within the scrotum. The fingernails are uniformly short and appear cut or bitten to the quicks. There is no clubbing of the digits. The posterior portions of the body are unremarkable. No pitting edema of the ankles is found.

#### EXTERNAL EVIDENCE OF INJURY

No injury is seen. No recent or old needle puncture mark is identified.

#### INTERNAL EXAMINATION

Following the external examination, the body is opened with the usual Y-shaped incision. The color of the skeletal muscles is unremarkable. The ribs are intact and the pleural cavities are unremarkable. There is no evidence of pneumothorax or pleural effusions. The pre-peritoneal fat measures 3/4 of an inch in thickness, two inches below the level of the umbilicus. The peritoneal surfaces are normal. The spinal column appears normal.

#### INTERNAL EVIDENCE OF INJURY

No traumatic injuries are seen in the internal organs.

#### INTERNAL EVIDENCE OF THERAPY

None is seen.

San Mateo County Coroner's Office  
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1 SYSTEMS EXAMINATION

2  
3 **THYMUS:** The thymus, which overlies the great vessels at the base of the heart,  
4 weighs 50 grams. There are numerous scattered tiny petechiae-like hemorrhages  
5 throughout the thymus.

6  
7 **HEART:** The pericardial and epicardial surfaces are smooth and glistening.  
8 Within the pericardial sac are 20 mL of clear straw-colored fluid, which is  
9 removed and discarded. The pulmonary artery is opened in situ and palpated for  
10 thromboemboli and none is found. The right atrium appears moderately dilated.  
11 Blood is aspirated from the right side of the heart for a toxicologic sample. The  
12 heart weighs 300 grams. The predicted normal heart weight based on sex and  
13 height is 308 grams (range 218 to 435 grams) and based on sex and weight is 302  
14 grams (range 229 to 399 grams).<sup>\*</sup> The coronary arteries originate normally from  
15 the aorta; they are sectioned at closely-placed intervals revealing small vessels  
16 without evidence of calcification, atherosclerosis, mural hemorrhage, or luminal  
17 thrombus. The left anterior descending artery is noted to tunnel into the muscle of  
18 the anterior wall of the left ventricle over a 20 mm length, and up to 5 mm in  
19 depth near the central portion of the tunnel. The heart is opened along the flow of  
20 blood. The right ventricle measures up to 3 mm and the left ventricle measures up  
21 to 15 mm in thickness. The heart valves are unremarkable. The heart valve  
22 circumferences measure as follows: tricuspid 12.5 cm, pulmonic 7 cm, mitral 8.5  
23 cm, and aortic 5.5 cm. There is no evidence of rheumatic disease, mitral prolapse  
24 or vegetations. The endocardial surfaces are smooth and glistening. The  
25 myocardium is normal, with no gross evidence of necrosis or scarring. No  
26 auricular or endocardial clots are seen. The foramen ovale is closed.

27  
28 The formalin-fixed heart is re-examined on 10-29-06, and two Polaroid  
29 photographs are taken. Below the pulmonary valve, the anterior wall of the right  
30 ventricle shows a pocket-like diverticulum. The opening measures 7 x 12 mm, and  
31 the pocket is 15 mm deep. This diverticulum is located beneath the course of the  
32 right coronary artery. Also noted is a 5 mm patch of endocardial fibrosis on the  
33 septal wall of the right ventricle near the apex.

34  
35 **LUNGS:** The right lung weighs 310 grams and the heavier left lung weighs 370  
36 grams. Both lungs show pink and crepitant parenchyma in the anterior portions  
37 and a slight degree of generalized congestion which is most prominent in the  
38 posterior dependent portions. There is a slight degree of irregularity in the aeration

---

<sup>\*</sup> Reference: Mayo Clinic Proceedings 63: 1237 - 1246, 1988. Kitzman, D. et al. Age-related changes in normal human hearts during the first 10 decades of life, Part II (Maturity): A quantitative anatomic study of 765 specimens from subjects 20 to 99 years old.

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1 of the anterior portion of the right lung. There is spotty black anthracotic pigment  
2 over the pleural surfaces of both lungs. No discrete area of consolidation is found.  
3 There is no evidence of aspiration of gastric contents. The bronchial tree is free of  
4 fluid or foreign material. No thromboembolus is seen. The hilar lymph nodes are  
5 grossly unremarkable. No aromatic or alcohol-like odor is detected.  
6

7 **NECK ORGANS:** The neck organs are examined towards the conclusion of the  
8 autopsy and they appear grossly normal. The thyroid gland is normal in size and  
9 shape, and the airway is clear. The hyoid bone, thyroid cartilage and cricoid  
10 cartilage are intact. The carotid arteries are left intact at the conclusion of the  
11 autopsy to assist the mortician. The cervical spine is grossly intact. The strap  
12 muscles of the neck are atraumatic.  
13

14 **LIVER:** The liver weighs 1400 grams. The liver is grossly normal.  
15

16 **GALLBLADDER:** The gallbladder and bile ducts are grossly normal. There is  
17 no evidence of gallstones or duct obstruction.  
18

19 **SPLEEN:** The spleen weighs 180 grams. The spleen shows unusual lobulation  
20 with several triangular depressions of the capsule resulting in "dog-ear"-like  
21 triangular lobes. The capsule is thin and intact, and the parenchyma has a uniform  
22 dark red color and normal consistency.  
23

24 **PANCREAS:** The pancreas is unremarkable. There is no evidence of hemorrhagic  
25 inflammation, fat necrosis or calculi.  
26

27 **GASTROINTESTINAL TRACT:** There is no palpable evidence of a hiatus  
28 hernia. The esophagus is normal. Within the stomach are approximately 15 grams  
29 of mucoid fluid. No pills or capsules are seen and there is no chemical gastritis.  
30 The mucosal surfaces of the esophagus, stomach, and duodenum are intact. No  
31 ulcer or ulcer scar is seen and there is no gross evidence of gastrointestinal  
32 bleeding. The small intestine, appendix and large intestine are unremarkable. No  
33 intestinal foreign body is detected.  
34

35 **ADRENALS:** The adrenal glands are grossly normal in size, shape, and color.  
36

37 **UROGENITAL SYSTEM:** The right kidney weighs 110 grams and the left  
38 kidney weighs 150 grams. The thin capsules strip with ease from the smooth renal  
39 surfaces. Both kidneys show a moderate degree of generalized congestion. The  
40 ureters are normal in caliber. The urinary bladder contains approximately 50 mL

San Mateo County Coroner's Office  
PICON, Nicholas  
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1 of yellow urine. A Bayer Diastix is negative for glucose. The prostate and testes  
2 are grossly normal.

3  
4 AORTA: The aorta is unremarkable.

5  
6 CENTRAL NERVOUS SYSTEM: By means of a bi-temporal incision, the scalp  
7 is reflected. There is no evidence of scalp trauma and specifically, no bruise is  
8 seen in the posterior neck or occipital areas. There is no evidence of skull fracture  
9 and the dura is subsequently stripped from the internal aspect of the skull for  
10 confirmation. The calvarium is removed in the usual fashion by the Forensic  
11 Autopsy Technician. The calvarium is normal in color, thickness, and consistency.  
12 The brain weighs 1380 grams. The cerebellum and brainstem contribute 200  
13 grams to the total brain weight. The dura and leptomeninges are unremarkable.  
14 The arteries at the base of the brain are thin and delicate. The brain is symmetrical  
15 and shows no focal lesions. There is no herniation of the cerebellar tonsils or unci.  
16 The brain is sectioned in the fresh state by means of closely-placed coronal  
17 sections and no unusual features are detected. There is no evidence of  
18 hydrocephalus. The substantia nigra is normally pigmented. The pituitary gland is  
19 unremarkable. The foramen magnum and dens are grossly normal.

20  
21 DIAGRAMS ATTACHED

22  
23 One-page.

24  
25 TISSUE SPECIMENS

26  
27 Specimens are retained in 10% buffered formalin for diagnostic purposes. The  
28 cardiac specimen is retained to permit further detailed examination.

29  
30 Sections taken on 10-29-06:

- 31  
32 1. Tunneled left anterior descending coronary artery  
33 2. Right ventricular endocardium  
34 3. Right and left ventricular myocardium  
35

36 PHOTOGRAPHS

37  
38 An identification Polaroid photograph is taken by the Forensic Autopsy  
39 Technician and sent to the Coroner's Office. Two Polaroid photographs of the  
40 heart are taken on 10-29-06.  
41

San Mateo County Coroner's Office  
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1 TOXICOLOGY AND/OR CHEMISTRY

2  
3 Submitted to Central Valley Toxicology are samples of pulled scalp hair, aspirated  
4 femoral peripheral blood, bladder urine, gallbladder bile, stomach contents, liver  
5 tissue, kidney tissue, brain tissue, and a vitreous humor sample taken at 0925  
6 hours.

7  
8 Retained in the morgue: heart blood.  
9

10 MICROSCOPIC

11  
12 Four H&E slides are received from Histo-Tec Laboratory on 11-8-06.  
13

14 Subtle histologic findings include rare round cells in epicardial fat, rare minute  
15 foci of interstitial round cells, and focal minimal myocardial nuclear enlargement.  
16

17 No smudged cross striations, cellular reaction to infarction, contraction band  
18 necrosis, intramural vascular sclerosis, or interstitial fibrosis is seen in these  
19 samples.  
20

21 Sections from the left anterior descending artery include tissue from the  
22 myocardial bridge (some histologic malorientation is present).  
23

24 Sections of the right ventricle show focal endocardial fibrosis and thickening.  
25  
26

27 **EPILOGUE AND OPINION:** The main autopsy findings were limited to the  
28 heart. The presence of the left anterior descending coronary artery in a myocardial  
29 tunnel (also known as myocardial coronary bridging) is thought to result in cardiac  
30 ischemia during systole, and that focal myocardial ischemia can lead to a fatal  
31 dysrhythmia.  
32

33 While this recognized condition is subject to some controversy in the medical  
34 literature, the history and findings in this case are consistent with this mechanism.  
35 The unusual diverticulum in the right ventricular wall is most unusual and of  
36 questionable or doubtful physiologic significance.  
37

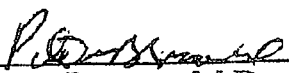
38 **Reference:**

39  
40 Virmani, R., Farb, A., Burke, A.P., Ischemia From Myocardial Coronary  
41 Bridging: Fact or Fancy?, Human Pathol., Vol. 24, pp 687 - 688, 1993.

San Mateo County Coroner's Office  
PICON, Nicholas  
Autopsy Report, Case No. 06-2533-A

END OF REPORT ..

1  
2  
3  
4  
5  
6  
7  
8  
9  
10

  
Peter A. Benson, M.D.  
Forensic Pathologist

PAB:as  
D: 10-26-06  
T: 10-26-06



NOTICE OF CASE MANAGEMENT CONFERENCE

PICON

ENDORSED FILED  
SAN MATEO COUNTY

Case No. **CIV 4 6 7 1 6 1**

vs.

SAN MATEO

OCT 24 2007

Clerk of the Superior Court  
By R. Montgomery  
DEPUTY CLERK

Date: **MAR 5 2008**

Time: 9:00 a.m.

Dept. 2 - on Tuesday & Friday  
**Dept. 8** on Wednesday & Thursday

You are hereby given notice of your Case Management Conference. The date, time and department have been written above.

1. In accordance with applicable California Rules of Court and Local Rules 2.3(d)1-4 and 2.3(m), you are hereby ordered to:
  - a. Serve all named defendants and file proofs of service on those defendants with the court within **60 days** of filing the complaint (CRC 3.110).
  - b. Serve a copy of this notice, Case Management Statement and ADR Information Sheet on all named parties in this action.
  - c. **File and serve** a completed Case Management Statement at least **15 days** before the Case Management Conference [CRC 3.725]. Failure to do so may result in monetary sanctions.
  - d. **Meet and confer**, in person or by telephone, to consider each of the issues identified in CRC 3.724 no later than **30 days** before the date set for the Case Management Conference.
2. **If you fail to follow the orders above, you are ordered to show cause why you should not be sanctioned. The Order To Show Cause hearing will be at the same time as the Case Management Conference hearing. Sanctions may include monetary, evidentiary or issue sanctions as well as striking pleadings and/or dismissal.**
3. Continuances of case management conferences are highly disfavored unless good cause is shown.
4. Parties may proceed to an appropriate dispute resolution process ("ADR") by filing a Stipulation To ADR and Proposed Order (see attached form.). If plaintiff files a Stipulation To ADR and Proposed Order electing to proceed to judicial arbitration, the Case Management Conference will be taken off the court calendar and the case will be referred to the Arbitration Administrator. If plaintiffs and defendants file a **completed** stipulation to another ADR process (e.g., mediation) **10 days** prior to the first scheduled case management conference, the case management conference will be continued for 90 days to allow parties time to complete their ADR session. The court will notify parties of their new case management conference date.
5. If you have filed a default or a judgment has been entered, your case is not automatically taken off the Case Management Conference Calendar. If "Does", "Roes", etc. are named in your complaint, they must be dismissed in order to close the case. If any party is in bankruptcy, the case is stayed only as to that named party.
6. You are further ordered to appear in person\* (or through your attorney of record) at the Case Management Conference noticed above. You must be thoroughly familiar with the case and fully authorized to proceed.
7. The Case Management judge will issue orders at the conclusion of the conference that may include:
  - a. Referring parties to voluntary ADR and setting an ADR completion date;
  - b. Dismissing or severing claims or parties;
  - c. Setting a trial date.
8. The Case Management judge may be the trial judge in this case.

For further information regarding case management policies and procedures, see the court website at [www.sanmateocourt.org](http://www.sanmateocourt.org).

\* Telephonic appearances at case management conferences are available by contacting CourtCall, LLC, an independent vendor, at least 5 business days prior to the scheduled conference (see attached CourtCall information).



MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)  
By: John D. Nibbelin, Deputy (SBN 184603)  
By: Rebecca M. Archer, Deputy (SBN 202743)  
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Redwood City, CA 94063  
Telephone: (650) 363-4686  
Facsimile: (650) 363-4034

Attorneys for Defendants  
COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individually and as Coroner, SAN  
MATEO COUNTY

**ENDORSED FILED**  
**SAN MATEO COUNTY**  
**DEC 14 2007**

*Clerk of the Superior Court*  
**By M. MARLOWE**  
~~DEPUTY CLERK~~

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON

Plaintiffs,

vs.

COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

Defendants.

Case No. 467161

**COUNTY OF SAN MATEO'S NOTICE OF  
EX PARTE APPLICATION AND  
APPLICATION FOR EXTENSION OF  
TIME TO RESPOND TO COMPLAINT OF  
ISOLINA PICON**

Hearing:

Date: December 14, 2007  
Time: 2:00 pm  
Dept: Law and Motion

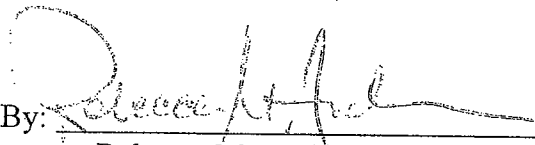
1 PLEASE TAKE NOTICE THAT ON DECEMBER 14, 2007 at 2:00 p.m. in the Superior Court  
2 of the County of San Mateo, Law and Motion Department at 400 County Center, Redwood City.  
3 Defendant, County of San Mateo will seek an EX PARTE ORDER extending the County's time to  
4 respond to the Compliant of Plaintiff, ISOLINA PICON.

5 This EX PARTE Application is based this Notice on the accompanying Memorandum of Points  
6 and Authorities, the Declaration of Rebecca M. Archer in Support of Ex Parte Application.

7  
8  
9 Dated: December 12, 2007

Respectfully submitted,

10 MICHAEL P. MURPHY, COUNTY COUNSEL

11  
12 By:   
13 Rebecca M. Archer, Deputy

14 Attorneys for Defendants  
15 COUNTY OF SAN MATEO, ROBERT  
16 FOUCRAULT, individuall and as Coroner, SAN  
MATEO COUNTY

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28

MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)  
By: John D. Nibbelin, Deputy (SBN 184603)  
By: Rebecca M. Archer, Deputy (SBN 202743)  
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Attorneys for Defendants  
COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individually and as Coroner, SAN  
MATEO COUNTY

**ENDORSED FILED**  
**SAN MATEO COUNTY**

DEC 14 2007

Clerk of the Superior Court  
By AL MARLOWE  
CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON

Plaintiffs,

vs.

COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

Defendants.

Case No. 467161

COUNTY OF SAN MATEO'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF EX  
PARTE APPLICATION FOR EXTENSION  
OF TIME TO RESPOND TO COMPLAINT  
OF ISOLINA PICON

I. INTRODUCTION

Defendants, County of San Mateo and Robert Foucrault (collectively the "County") requested that plaintiff's attorney, Ayanna L. Jenkins-Toney grant it a short four day extension to respond to the complaint due to County Counsel's 36 week pregnancy, impending maternity leave and unexpected urgent matters that had recently arisen. Ms. Jenkins-Toney refused unless the County would agree only to answer the complaint and not file any other responsive pleading. The County, therefore, requests that the Court intervene and grant the County a short extension of time to respond to plaintiff's complaint, currently due on December 17, 2007.

Case No. 467161

COUNTY OF SAN MATEO'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX  
PARTE APPLICATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA  
PICON

## II. STATEMENT OF FACTS

Plaintiff, Isolina Picon, by and through her attorney Ayanna L. Jenkins-Toney, served her complaint on the County on November 16, 2007. Prior to Monday, December 10, 2007, the County had every intention of timely responding to the Complaint on December 17, 2007. Counsel for the County, Deputy County Counsel Rebecca M. Archer, is 36 weeks pregnant and preparing to go out on maternity leave at the end of the year and a number of urgent matters arose during the weeks of December 3 and 10 necessitating an extension to respond to the complaint. (Declaration of Rebecca M. Archer in Support of Ex Parte Application (“Archer Decl.”) at ¶¶1-2.) As a result Counsel requested a short, four day extension from Ms. Jenkins-Toney to respond to plaintiff’s complaint up until and including December 21, 2007. (*Id.* at p 2.) County Counsel first made this request on Monday, December 10, 2007 via telephone. (*Id.* at ¶ 3.) Ms. Jenkins-Toney did not return her call. Counsel renewed her request on Tuesday, December 11, 2007 by phone. Ms. Jenkins-Toney again failed to return her call. Counsel then sent an email and a facsimile request to Ms. Jenkins-Toney that same day. (*Id.* ¶ 4 at Exh. A) Ms. Jenkins-Toney still did not respond. County Counsel urgently renewed the request by phone on December 12, 2007 stating that because the date was imminent she needed an immediate response and explaining the reason she needed an extension. Ms. Jenkins-Toney finally returned that call at approximately 12:45 p.m. on December 12, 2007. (*Id.* at ¶ 5.) However, Ms. Jenkins-Toney refused to grant County Counsel’s reasonable request for an extension to respond to the complaint and instead stated that she would only agree to an extension *if* the County were only to *answer* the complaint and not file any other kind of responsive pleading. Despite attempts by County’s Counsel to point out the unreasonableness of such a condition, Ms. Jenkins-Toney insisted that it was the only way she would agree to an extension. (*Id.*)

County’s Counsel then called Ms. Jenkins-Toney at approximately 1:15 p.m. and informed her that the County would go in ex parte to request an extension to respond to the complaint. County’s Counsel also sent a facsimile letter notifying Ms. Jenkins-Toney of her intent to go in ex parte and renewed her request to Ms. Jenkins-Toney for a reasonable four day extension that would in no way prejudice her client’s rights. (*Id.* at 18; Exh. C.) County’s Counsel referred Ms. Jenkins-Toney to the State Bar’s Guidelines of Civility and Professionalism, Section 6 which states that an attorney should

1 agree to reasonable requests for time that are not adverse to a client's interests. (Id. Exh. D.)

2 At approximately 1:21 p.m. Ms. Jenkins-Toney sent County Counsel a facsimile letter stating that  
3 she would not agree to an extension because she did not believe it would be in her client's best interests  
4 "to agree to an extension so that the County could better prepare some adversarial motion, etc., against  
5 my client beyond the established customary time." (Id. at Exh. B.)

### 6 III. ARGUMENT

7 The County's request for an extension of time to respond to plaintiff's complaint is reasonable  
8 and within the customary professional courtesies exchanged among civil professionals. Indeed, the  
9 request for a very short extension of 4 days is well below the customary request of 15 to 30 days often  
10 requested as a matter of course in responding to a complaint civil litigation. Moreover, County's  
11 Counsel has a valid rationale for requesting the time extension -- that is the press of other emergency  
12 business of the County that has prevented her from turning to this matter sooner as well as her impending  
13 maternity leave which has created an urgency in other matters under her supervision. County's Counsel  
14 has requested a mere four days extension to attend to *other matters*, not to allow her added time to further  
15 develop arguments against plaintiff's complaint. The County assures the Court that the arguments are  
16 well developed and need only be finalized on paper. But for her 36 week pregnancy, and several  
17 emergency matters that arose in the past weeks, the extension would not be necessary.

18 Ms. Jenkins-Toney's rationale for refusing an extension of time does a disservice to the Court.  
19 She says that it is not in her client's interest to allow extra time for the County to "better prepare some  
20 adversarial motion, etc against my client." She is essentially saying that she does not want a well  
21 researched and thoughtful motion, but would rather use her power to refuse an extension to ensure that  
22 essential arguments and issues are not put before the Court that may shed light on the weaknesses of her  
23 case. Such gamesmanship runs directly contrary to the interests of justice. Either Ms. Jenkins-Toney can  
24 support her client's claims or she cannot. Whether the County has an extra few days to advance its  
25 arguments should not affect the ultimate strength or weakness of her case.

26 The concern of County's Counsel here is not whether a responsive pleading will be timely and  
27 well written by the County, but rather whether other pressing work of the County will be timely  
28 accomplished due to the advanced state of her pregnancy. County's Counsel is further dismayed that

1 such a reasonable professional courtesy is not granted so early in the litigation as it indicates that Ms.  
2 Jenkins-Toney intends to elevate form over substance and engage in gamesmanship in advancing  
3 important legal arguments for the Court's consideration.

4 Finally, Ms. Jenkins-Toney ignores the State Bar's guidelines of professional conduct which  
5 make clear that attorneys should be reasonable in scheduling matters in order to avoid unnecessary  
6 intervention of the courts in matters that should be easily agreed to among adult professionals. Section 6  
7 of the California Attorney Guidelines of Civility and Professionalism clearly state "Consistent with  
8 existing law and court orders, an attorney should agree to reasonable request for extensions of time that  
9 are not adverse to a client's interests." (Archer Decl. at Exh. D.) The examples in the guidelines go on  
10 to state "a. Unless time is of the essence, an attorney should agree to an extension without requiring  
11 motions or other formalities ... e. An attorney should place conditions on an agreement to an extension  
12 only if they are fair and essential or if the attorney is entitled to impose them, for instance to preserve  
13 rights or seek reciprocal scheduling concessions." (Id.)

14 ///

15 ///

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28 ///

IV. CONCLUSION

County Counsel's request for a short extension up until and including December 21, 2007 is not unreasonable and should have been allowed by Ms. Jenkins-Toney as a professional courtesy given that it does not in any way prejudice her client's rights and interests in any way. As counsel was not able to reason with Ms. Jenkins-Toney, it requests that the Court intervene and grant a 15 day extension to respond to the complaint, up until and including January 2, 2008. In the alternative, the County requests the original 4 day extension requested of Ms. Toney-Jenkins up until and including December 21, 2007.

Dated:

Respectfully submitted,

MICHAEL P. MURPHY, COUNTY COUNSEL

By:   
Rebecca M. Archer, Deputy

Attorneys for Defendants  
COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

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MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)  
By: John D. Nibbelin, Deputy (SBN 184603)  
By: Rebecca M. Archer, Deputy (SBN 202743)  
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Facsimile: (650) 363-4034

Attorneys for Defendants  
COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individually and as Coroner, SAN  
MATEO COUNTY

**ENDORSED FILED**  
**SAN MATEO COUNTY**

**DEC 14 2007**

Clerk of the Superior Court  
By M. MARLOWE  
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON

Plaintiffs,

vs.

COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

Defendants.

Case No. 467161

**DECLARATION OF REBECCA M.  
ARCHER IN SUPPORT OF COUNTY OF  
SAN MATEO'S EX PARTE APPLICATION  
FOR EXTENSION OF TIME TO RESPOND  
TO COMPLAINT OF ISOLINA PICON**

I, Rebecca M. Archer, am a Deputy County Counsel with the Office of County Counsel for the County of San Mateo. This Office represents Defendants the County of San Mateo and Robert Foucrault, individual and as Coroner, San Mateo County in this action. This Declaration is respectfully submitted in support of Defendants' Application for Extension of Time to Respond to Complaint.

1. I am 36 weeks pregnant and plan to go on maternity leave at the end of the year. I am Counsel to five County Departments and handle 4-6 active litigation matters at any given time. I am in the process of trying to wind up a number of different projects in preparation for my maternity leave.

2. During the week of December 3, and 10, 2007 a number of urgent issues arose related to my duties as Counsel to the Housing Department as well as to the Human Services Agency Special

Case No. 467161

DECLARATION OF REBECCA M. ARCHER IN SUPPORT OF COUNTY OF SAN MATEO'S EX PARTE  
APPLICATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON

1 Immigrant Juvenile duties, in addition to having to continue my daily role as advisor to other department  
2 and ongoing litigation. Due to my pregnancy and imminent due date my physical resources are limited.  
3 As a result I contacted Ms. Jenkins-Toney, counsel for plaintiff in the above captioned matter to request a  
4 short extension, as soon as it became apparent that the December 17, 2007 deadline would be difficult for  
5 me to meet.

6 3. On Monday, December 10, 2007 I called Ms. Jenkins-Toney and requested a short, four day,  
7 extension to respond to the complaint, up until and including December 21, 2007. Ms. Jenkins-Toney  
8 did not return my call on that day.

9 4. On December 11, 2007 I again called Ms. Jenkins-Toney and reiterated my request explaining  
10 that her immediate response was requested as time was of the essence. When several hours went by  
11 without hearing from Ms. Jenkins-Toney, I sent her an email and a facsimile letter reiterating my request  
12 and informing her that I had been unable to reach her by phone. Ms. Jenkins-Toney did not call me on  
13 December 11, 2007. A true and correct copy of my December 11, 2007 correspondence is attached  
14 hereto as Exhibit A.

15 5. The morning of December 12, 2007 I again called Ms. Jenkins-Toney to request an extension  
16 and explained that the reason I needed the extension related to the press of urgent work and my  
17 impending maternity leave and advanced pregnancy. At approximately 12:45 p.m. on December 12,  
18 2007 Ms. Jenkins-Toney returned my call and informed me that she would only grant me an extension to  
19 answer her client's complaint and not to file any other responsive pleading. I attempted to reason with  
20 Ms. Jenkins-Toney informing her that as a general rule professional courtesies were not conditioned on  
21 agreeing to waive a client's rights, but rather were granted as a courtesy to another professional. Ms.  
22 Jenkins-Toney continued to refuse my four day request necessitating this motion.

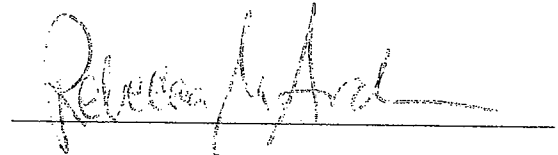
23 6. At approximately 1:15 p.m. I again called Ms. Jenkins-Toney to inform her that I intended to  
24 make an ex-parte motion to request an extension of time on Friday, December 12, 2007 at 2:00 p.m. Her  
25 receptionist informed me that she was not in the office, so I left a voicemail.

26 7. At approximately 1:21 p.m. I received a facsimile letter from Ms. Jenkins-Toney confirming  
27 our conversation that she would *only* grant me an extension if I would agree that the only responsive  
28 pleading I would file would be an answer and stating that her rationale for not granting me an extension

1 was that it was not in her client's best interests "to agree to an extension so that the County could better  
2 prepare some adversarial motion, etc., against my client beyond the established customary time." A true  
3 and correct copy of that December 12, 2007 facsimile is attached hereto as Exhibit B.

4 8. That same afternoon of December 12, 2007 I sent Ms. Jenkins-Toney two facsimile letters  
5 informing her that I intended to seek an ex-parte order requesting an extension of time to respond to the  
6 complaint and renewing my request that she grant me the extension as a professional courtesy. The  
7 second letter was sent because I failed to include the time of the ex-parte hearing and department in the  
8 first missive. In both letters, I referred her to the State Bar of California's Guidelines of Civility and  
9 Professionalism, Section 6 which states that an attorney should agree to reasonable requests for time that  
10 are not adverse to a client's interests. True and correct copies of my December 12, 2007 correspondence  
11 are attached hereto as Exhibit C. A true and correct copy of Section 6 of the State Bar of California's  
12 Guidelines of Civility and Professionalism is attached hereto as Exhibit D.

13 I declare under penalty of perjury under the laws of the State of California that the foregoing is  
14 true and correct. If called upon, I could competently testify thereto. Executed this 14<sup>th</sup> day of December  
15 2007.



Rebecca M. Archer

18 L:\LITIGATE\P\_CASES\PICON\Pleadings\Archer Dec ISO Ex Parte Application for Extension of Time.doc

**EXHIBIT A**

Rebecca M. Archer - Isolina Picon Matter

---

From: Rebecca M. Archer  
To: ayannaj@msn.com  
Date: 12/11/2007 12:35 PM  
Subject: Isolina Picon Matter

---

Ayanna L. Jenkins  
Law Offices of Ayanna L. Jenkins-Toney  
225 Bush Street, 16th Floor  
San Francisco, CA 94901

VIA EMAIL (415) 464-4975

Dear Ms. Jenkins-Toney,

I would like to request a short extension of the County's time to respond to Isolina Picon's complaint, case No. 467161 pending in the San Mateo Superior Court. Our current response is due on December 17, 2007. An extension of 15 days would be ideal (up until January 2, 2008), but I would also be happy if you would agree to a short 4 day extension up until and including December 21, 2007. As our last day to respond is fast approaching and I have been unable to reach you by telephone, I would appreciate an immediate response by telephone, fax or email that you will agree to one of the above extensions. For your convenience, my email is [rmarcher@co.sanmateo.ca.us](mailto:rmarcher@co.sanmateo.ca.us). Thank you for your professional courtesy in this matter.

Very truly yours,  
Rebecca M. Archer

Rebecca M. Archer  
Deputy County Counsel  
County of San Mateo  
400 County Center 6th Floor  
Redwood City, CA 94063-1662

Tel: (650) 363-4686  
Fax: (650) 363-4762

**EXHIBIT B**

LAW OFFICES OF

Ayanna L. Jenkins -Toney, Esq.

FAX#(415) 464-4975

FAX TRANSMITTAL

TO: County Counsel Of San Mateo	FROM: Ayanna L. Jenkins Toney, Esq.
FAX# (415) 464-4975	DATE: DECEMBER 12, 2007

# OF PAGES INCLUDING COVER 2

Re: Isolina Picon v. San Mateo County, et al. #467161

Truly,  
Ayanna L. Jenkins-Toney

CONFIDENTIALITY NOTICE

The documents accompanying this facsimile transmission contain confidential information belonging to the sender which is legally privileged. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of this facsimile information is strictly prohibited. If you have received this facsimile in error, please notify us by telephone to arrange for the return of the original documents to us.

LAW OFFICES OF  
AYANNA L. JENKINS TONEY, ESQ.

225 BUSH STREET  
16TH FLOOR  
SAN FRANCISCO, CA 94104  
(415) 439-8388 OFFICE  
(415) 439-8304 FAX

AyannaJ@msn.com

700 LARKSPUR LANDING CIRCLE  
SUITE 199  
LARKSPUR, CA 94939  
(415) 464-4974 OFFICE  
(415) 464-4975 FAX

December 12, 2007

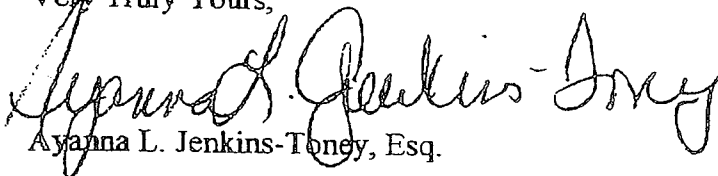
County Counsel  
County Of San Mateo  
Hall of Justice And Records, 6<sup>th</sup> floor  
400 County Center  
Redwood City, CA 94603-1662

Re: Picon, Isolina v. San Mateo County, et al. # 467161

Dear County Counsel of San Mateo,

This letter will serve to memorialize the offer that I made in response to your request for an extension of time to respond to the complaint filed on behalf of Isolina Picon. As I stated I would be amenable to an extension for the purpose of filing an *answer* only. This offer was made as a professional courtesy. However, I do not feel that it would be in my clients best interests if I were to agree to an extension so that the County could better prepare some adversarial motion, etc. against my client beyond the established customary time. This offer was communicated via telephone conversation to Rebecca Archer. The offer was rebuffed, therefore I will be expecting an answer to the timely filed and served complaint on the date specified by the Rules of Civil Procedure.

Very Truly Yours,

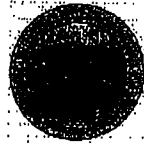
  
Ayanna L. Jenkins-Toney, Esq.

**EXHIBIT C**

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650 363 4034- \*\*\*\*\*



# FAX TRANSMISSION

COUNTY OF SAN MATEO  
OFFICE OF THE COUNTY COUNSEL  
400 COUNTY CENTER, 6<sup>TH</sup> FLOOR  
REDWOOD CITY, CA 94063

DATE: December 12, 2007

TO: Ayanna L. Jenkins FAX NUMBER: 415-464-4975

FROM: Rebecca Archer  
Telephone: (650) 363-4686  
Facsimile: (650) 363-4034

RE:

COMMENTS:

**FAX OPERATOR:**

If you do not receive all pages or if the copy is not legible, please call the fax operator at County Counsel Office of the County of San Mateo at (650) 363-4250 as soon as possible.

CONFIDENTIALITY NOTICE: This transmittal page and the documents accompanying this telecopy transmission contain confidential information belonging to the sender which is legally privileged. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or taking of any action in reliance on the contents of this telecopied information is strictly prohibited. If you received this telecopy in error, please immediately notify us by telephone to arrange for return of the original documents to us.

COUNTY COUNSEL  
MICHAEL P. MURPHY

**CHIEF DEPUTIES**

JOHN C. BEIERS  
DEBORAH PENNY BENNETT  
BRENDA B. CARLSON

**COUNTY COUNSEL**

COUNTY OF SAN MATEO

HALL OF JUSTICE AND RECORDS • 6<sup>TH</sup> FLOOR  
400 COUNTY CENTER • REDWOOD CITY, CA 94063-1662  
TELEPHONE: (650) 363-4250 • FACSIMILE: (650) 363-4034  
*Please respond to: (650) 363-4686*

December 12, 2007

*Via Facsimile (415) 464-4975*

Ayanna L. Jenkins  
Law Offices of Ayanna L. Jenkins-Toney  
225 Bush Street, 16th Floor  
San Francisco, CA 94901

*Re: Picon, Isolina v. San Mateo County, et al. # 467161.*

Dear Ms. Jenkins-Toney,

This is to inform you, as I did by voicemail at 1:15 p.m. today, that I intend to go in ex-parte on Friday, December 14, 2007 for an order requesting an extension of time to respond to your complaint. I will serve you with my papers as soon as reasonably possible.

I would like to take this opportunity to once again request that you grant me a very reasonable and short extension of four days to December 21, 2007 to respond to your complaint in light of my impending maternity leave and limited opportunity to wrap up a number of matters before I go. My understanding from our conversation of today is that you would be willing to grant me an extension *only* if I agree that it would be to *answer* the complaint. In my experience a professional courtesy is not conditioned on the nature of the response but on the professional *courtesy* requested.

**DEPUTIES**

KATHRYN E. ALBERT  
REBECCA M. ARCHER  
AIMEE B. ARMSBY  
CLAIRE A. CUNNINGHAM  
PETER K. FINCH  
TIMOTHY J. FOX  
PORTOR GOLTZ  
JUDITH A. HOLIBER  
DAVID A. LEVY  
KIMBERLY A. MARLOW  
JOHN D. NIBBELIN  
PAUL A. OKADA  
DAVID A. SILBERMAN  
WILLIAM E. SMITH  
MIRUNI SOOSAIPILLAI  
V. RAYMOND SWOPE III  
LEE A. THOMPSON  
EUGENE WHITLOCK  
CAROL L. WOODWARD

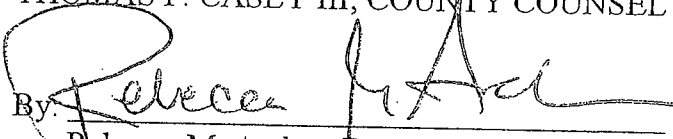
December 12, 2007

Page 2

I refer you to Section 6 of the State Bar Guidelines of Civility and Professionalism Scheduling, Continuances and Extensions of Time. That section states: "an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests." Under the examples in the guidelines it states "a. Unless time is of the essence, an attorney should agree to an extension without requiring motions or other formalities ... e. An attorney should place conditions on an agreement to an extension only if they are fair and essential or if the attorney is entitled to impose them, for instance to preserve rights or seek reciprocal scheduling concessions."

Yours truly,

THOMAS F. CASEY III, COUNTY COUNSEL

By:   
Rebecca M. Archer, Deputy

TFC:RMA/cp

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COUNTY COUNSEL

MICHAEL P. MURPHY

## CHIEF DEPUTIES

JOHN C. BEIERS

DEBORAH PENNY BENNETT

BRENDA B. CARLSON



## COUNTY COUNSEL

COUNTY OF SAN MATEO

HALL OF JUSTICE AND RECORDS • 6<sup>TH</sup> FLOOR

400 COUNTY CENTER • REDWOOD CITY, CA 94063-1662

TELEPHONE: (650) 363-4250 • FACSIMILE: (650) 363-4034

*Please respond to: (650) 363-4686*

December 12, 2007

*Via Facsimile (415) 464-4975*

Ayanna L. Jenkins  
Law Offices of Ayanna L. Jenkins-Toney  
225 Bush Street, 16th Floor  
San Francisco, CA 94901

Re: *Picon, Isolina v. San Mateo County, et al.* #467161

Dear Ms. Jenkins-Toney,

I failed to include the time and department in my last letter regarding the ex parte application, so this is a revised notice of my intent to seek ex parte relief. I am also attaching a notice of application.

This is to inform you, as I did by voicemail at 1:15 p.m. today, that I intend to go in ex parte on Friday, December 14, 2007 at 2:00 p.m. in the Department of Law and Motion at 400 County Center, Redwood City, for an order requesting an extension of time to respond to your complaint. I will serve you with my papers as soon as reasonably possible.

I would like to take this opportunity to once again request that you grant me a very reasonable and short extension of four days to December 21, 2007 to respond to your complaint in light of my impending maternity leave and limited opportunity to wrap up a number of matters before I go. My understanding from our conversation of today is that you would be willing to grant me an extension *only* if I agree that it would be to *answer* the complaint. In my experience a professional courtesy is not conditioned on the nature of the response but on the professional *courtesy* requested.

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PAUL A. OKAD

DAVID A. SILBERMA

WILLIAM E. SMITH

MIRUNI SOOSAIPILLA

V. RAYMOND SWOPE II

LEE A. THOMPSON

EUGENE WHITLOCK

CAROL L. WOODWARD

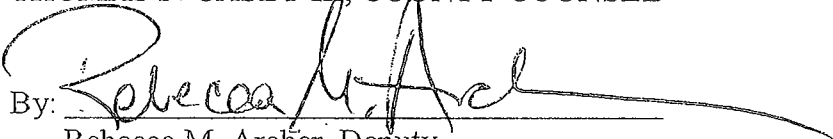
December 12, 2007

Page 2

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Yours truly,

THOMAS F. CASEY III, COUNTY COUNSEL

By:   
Rebecca M. Archer, Deputy

TFC:RMA/cp

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1 MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)  
By: John D. Nibbelin, Deputy (SBN 184603)  
2 By: Rebecca M. Archer, Deputy (SBN 202743)  
Hall of Justice and Records  
3 400 County Center, 6<sup>th</sup> Floor  
Redwood City, CA 94063  
4 Telephone: (650) 363-4686  
Facsimile: (650) 363-4034  
5

Attorneys for Defendants  
6 COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individually and as Coroner, SAN  
7 MATEO COUNTY

8  
9  
10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 IN AND FOR THE COUNTY OF SAN MATEO

12 ISOLINA PICON

13 Plaintiffs,

14 vs.

15 COUNTY OF SAN MATEO, ROBERT  
16 FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

17 Defendants.  
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19  
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Case No. 467161

COUNTY OF SAN MATEO'S EX PARTE  
APPLICATION FOR EXTENSION OF  
TIME TO RESPOND TO COMPLAINT OF  
ISOLINA PICON

Hearing:

Date: December 14, 2007  
Time: 2:00 pm  
Dept: Law and Motion

1 PLEASE TAKE NOTICE THAT ON DECEMBER 14, 2007 at 2:00 p.m. in the Superior Court  
2 of the County of San Mateo, Law and Motion Department at 400 County Center, Redwood City.  
3 Defendant, County of San Mateo will seek an EX PARTE ORDER extending the County's time to  
4 respond to the Complaint of Plaintiff, ISOLINA PICON.

5 This EX PARTE Application is based this Notice on the accompanying Memorandum of Points  
6 and Authorities, the Declaration of Rebecca M. Archer in Support of Ex Parte Application.

7  
8  
9 Dated: December 12, 2007

Respectfully submitted,

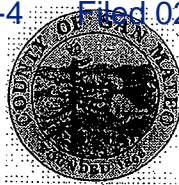
MICHAEL P. MURPHY, COUNTY COUNSEL

10  
11  
12  
13 By: 

Rebecca M. Archer, Deputy

14 Attorneys for Defendants  
15 COUNTY OF SAN MATEO, ROBERT  
16 FOUCRAULT, individually and as Coroner, SAN  
MATEO COUNTY

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# FAX TRANSMISSION

COUNTY OF SAN MATEO  
OFFICE OF THE COUNTY COUNSEL  
400 COUNTY CENTER, 6<sup>TH</sup> FLOOR  
REDWOOD CITY, CA 94063

DATE: December 12, 2007

TO: Ayanna L. Jenkins

FAX NUMBER: 415-464-4975

FROM: Rebecca Archer  
Telephone: (650) 363-4686  
Facsimile: (650) 363-4034

PAGES incl. cover: 45

RE:

COMMENTS:

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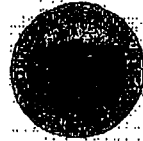
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-SMC COUNTY COUNSEL -

\*\*\*\*\*

- \*\*\*\*\* -

650 363 4034- \*\*\*\*\*



# FAX TRANSMISSION

COUNTY OF SAN MATEO  
OFFICE OF THE COUNTY COUNSEL  
400 COUNTY CENTER, 6<sup>TH</sup> FLOOR  
REDWOOD CITY, CA 94063

DATE: December 12, 2007

<b>TO:</b> Ayanna L. Jenkins		<b>FAX NUMBER:</b> 415-464-4975
<b>FROM:</b> Rebecca Archer Telephone: (650) 363-4686 Facsimile: (650) 363-4034		<b>PAGES</b> incl. cover: 45
<b>RE:</b>		

COMMENTS:

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**EXHIBIT D**

# California Attorney Guidelines of Civility and Professionalism



The State Bar of California  
180 Howard Street  
San Francisco, CA 94105-1639

Adopted by the Board of Governors on  
July 20, 2007

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CALIFORNIA ATTORNEY  
GUIDELINES OF CIVILITY AND PROFESSIONALISM  
(Adopted July 20, 2007)

INTRODUCTION

As officers of the court with responsibilities to the administration of justice, attorneys have an obligation to be professional with clients, other parties and counsel, the courts and the public. This obligation includes civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and conflict resolution.

These are guidelines for civility. The Guidelines are offered because civility in the practice of law promotes both the effectiveness and the enjoyment of the practice and economical client representation. The legal profession must strive for the highest standards of attorney behavior to elevate and enhance our service to justice. Uncivil or unprofessional conduct not only disserves the individual involved, it demeans the profession as a whole and our system of justice.

These voluntary Guidelines foster a level of civility and professionalism that exceed the minimum requirements of the mandated Rules of Professional Conduct as the best practices of civility in the practice of law in California. The Guidelines are not intended to supplant these or any other rules or laws that govern attorney conduct. Since the Guidelines are not mandatory rules of professional conduct, nor rules of practice, nor standards of care, they are not to be used as an independent basis for disciplinary charges by the State Bar or claims of professional negligence.

The Guidelines are intended to complement codes of professionalism adopted by bar associations in California. Individual attorneys are encouraged to make these guidelines their personal standards by taking the pledge that appears at the end. The Guidelines can be applicable to all lawyers regardless of practice area. Attorneys are encouraged to comply with both the spirit and letter of these guidelines, recognizing that complying with these guidelines does not in any way denigrate the attorney's duty of zealous representation.

- c. An attorney should not disparage the intelligence, integrity, ethics, morals or behavior of the court or other counsel, parties or participants when those characteristics are not at issue.
- d. Respecting cultural diversity, an attorney should not disparage another's personal characteristics.
- e. An attorney should not make exaggerated, false, or misleading statements to the media while representing a party in a pending matter.
- f. An attorney should avoid hostile, demeaning or humiliating words.
- g. An attorney should not create a false or misleading record of events or attribute to an opposing counsel a position not taken.
- h. An attorney should agree to reasonable requests in the interests of efficiency and economy, including agreeing to a waiver of procedural formalities where appropriate.
- i. Unless specifically permitted or invited by the court or authorized by law, an attorney should not correspond directly with the court regarding a case.

Nothing above shall be construed as discouraging the reporting of conduct that fails to comply with the Rules of Professional Conduct.

#### SECTION 5 PUNCTUALITY

An attorney should be punctual in appearing at trials, hearings, meetings, depositions and other scheduled appearances.

For example:

- a. An attorney should arrive sufficiently in advance to resolve preliminary matters.
- b. An attorney should timely notify participants when the attorney will be late or is aware that a participant will be late.

#### SECTION 6 SCHEDULING, CONTINUANCES AND EXTENSIONS OF TIME

An attorney should advise clients that civility and courtesy in scheduling meetings, hearings and discovery are expected as professional conduct.

For example:

- a. An attorney should consider the scheduling interests of the court, other counsel or party, and other participants, should schedule by agreement whenever possible, and should send formal notice after agreement is reached.

- b. An attorney should not arbitrarily or unreasonably withhold consent to a request for scheduling accommodations or engage in delay tactics.
- c. An attorney should promptly notify the court and other counsel of problems with key participants' availability.
- d. An attorney should promptly notify other counsel and, if appropriate, the court, when scheduled meetings, hearings or depositions must be cancelled or rescheduled, and provide alternate dates when possible.

In considering requests for an extension of time, an attorney should consider the client's interests and need to promptly resolve matters, the schedules and willingness of others to grant reciprocal extensions, the time needed for a task, and other relevant factors.

Consistent with existing law and court orders, an attorney should agree to reasonable requests for extensions of time that are not adverse to a client's interests.

For example:

- a. Unless time is of the essence, an attorney should agree to an extension without requiring motions or other formalities, regardless of whether the requesting counsel previously refused to grant an extension.
- b. An attorney should agree to an appropriate continuance when new counsel substitutes in.
- c. An attorney should advise clients that failing to agree with reasonable requests for time extensions is inappropriate.
- d. An attorney should not use extensions or continuances for harassment or to extend litigation.
- e. An attorney should place conditions on an agreement to an extension only if they are fair and essential or if the attorney is entitled to impose them, for instance to preserve rights or seek reciprocal scheduling concessions.
- f. If an attorney intends that a request for or agreement to an extension shall cut off a party's substantive rights or procedural options, the attorney should disclose that intent at the time of the request or agreement.

#### SECTION 7 SERVICE OF PAPERS

The timing and manner of service of papers should not be used to the disadvantage of the party receiving the papers.

For example:

1 MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)

By: John D. Nibbelin, Deputy (SBN 184603)

2 By: Rebecca M. Archer, Deputy (SBN 202743)

Hall of Justice and Records

3 400 County Center, 6<sup>th</sup> Floor

Redwood City, CA 94063

4 Telephone: (650) 363-4686

Facsimile: (650) 363-4034

5 Attorneys for Defendants

6 COUNTY OF SAN MATEO, ROBERT

FOUCRAULT, individually and as Coroner, SAN

7 MATEO COUNTY

8  
9  
10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 IN AND FOR THE COUNTY OF SAN MATEO

12 ISOLINA PICON

13 Plaintiffs,

14 vs.

15 COUNTY OF SAN MATEO, ROBERT

16 FOUCRAULT, individual and as Coroner, SAN

17 MATEO COUNTY

18 Defendants.

Case No. 467161

**[PROPOSED] ORDER GRANTING  
COUNTY OF SAN MATEO'S EX PARTE  
APPLICATION FOR EXTENSION OF  
TIME TO RESPOND TO COMPLAINT OF  
ISOLINA PICON**

19 On DECEMBER 14, 2007 Counsel for defendants County of San Mateo and Robert Foucrault,  
20 Coroner, Rebecca M. Archer, appeared before this Court ex-parte to request an extension of time to  
21 respond to plaintiff's complaint. Ayanna L. Jenkins-Toney appeared on behalf of plaintiff, Isolina Picon.  
22 Having reviewed the papers submitted and good cause appearing the Court GRANTS defendants'  
23 application and extends defendants' time to respond to the complaint by 15 days up until and including  
24 January 2, 2008.

25 IT IS SO ORDERED:

26  
27  
28 \_\_\_\_\_  
Judge of the Superior Court

Case No. 467161

**[PROPOSED] ORDER GRANTING COUNTY OF SAN MATEO'S EX PARTE APPLICATION FOR  
EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON**

1 MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)  
By: John D. Nibbelin, Deputy (SBN 184603)  
2 By: Rebecca M. Archer, Deputy (SBN 202743)  
Hall of Justice and Records  
3 400 County Center, 6<sup>th</sup> Floor  
Redwood City, CA 94063  
4 Telephone: (650) 363-4686  
Facsimile: (650) 363-4034  
5

6 Attorneys for Defendants  
COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individually and as Coroner, SAN  
7 MATEO COUNTY

8  
9  
10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 IN AND FOR THE COUNTY OF SAN MATEO

12 ISOLINA PICON

13 Plaintiffs,

14 vs.

15 COUNTY OF SAN MATEO, ROBERT  
16 FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

17 Defendants.  
18

Case No. 467161

[PROPOSED] ORDER GRANTING  
COUNTY OF SAN MATEO'S EX PARTE  
APPLICATION FOR EXTENSION OF  
TIME TO RESPOND TO COMPLAINT OF  
ISOLINA PICON

19 On DECEMBER 14, 2007 Counsel for defendants County of San Mateo and Robert Foucrault,  
20 Coroner, Rebecca M. Archer, appeared before this Court ex-parte to request an extension of time to  
21 respond to plaintiff's complaint. Ayanna L. Jenkins-Toney appeared on behalf of plaintiff, Isolina Picon.  
22 Having reviewed the papers submitted and good cause appearing the Court GRANTS defendants'  
23 application and extends defendants' time to respond to the complaint by 4 days up until and including  
24 December 21, 2007.

25 IT IS SO ORDERED.  
26  
27

28 \_\_\_\_\_  
Judge of the Superior Court

Case No. 467161

[PROPOSED] ORDER GRANTING COUNTY OF SAN MATEO'S EX PARTE APPLICATION FOR  
EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON

MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)  
By: John D. Nibbelin, Deputy (SBN 184603)  
By: Rebecca M. Archer, Deputy (SBN 202743)  
Hall of Justice and Records  
400 County Center, 6<sup>th</sup> Floor  
Redwood City, CA 94063  
Telephone: (650) 363-4686  
Facsimile: (650) 363-4034

Attorneys for Defendants  
COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individually and as Coroner, SAN  
MATEO COUNTY

ENDORSED FILED  
SAN MATEO COUNTY

DEC 14 2007

Clerk of the Superior Court  
By M. MARLOWE  
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON

Plaintiffs,

vs.

COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

Defendants.

Case No. 467161

PROOF OF SERVICE

PROOF OF SERVICE

I do hereby declare that I am a citizen of the United States employed in the County of San Mateo, over 18 years old and that my business address is 400 County Center, Redwood City, California. I am not a party to the within action.

On December 14, 2007, I served the following document(s):

COUNTY OF SAN MATEO'S NOTICE OF EX PARTE APPLICATION AND APPLICATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON

COUNTY OF SAN MATEO'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON

DECLARATION OF REBECCA M. ARCHER IN SUPPORT OF COUNTY OF SAN MATEO'S EX PARTE APPLICATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON

PROPOSED ORDER GRANTING COUNTY OF SAN MATEO'S EX PARTE APPLICATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON

on all other parties to this action by placing a true copy of said document(s) in a sealed envelope in the following manner:

☐ (BY U.S. MAIL) by placing a true copy of said document(s) in a sealed envelope(s) addressed as shown below for collection and mailing at Redwood City, California following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☐ (BY OVERNIGHT DELIVERY) by placing a true copy of said document(s) in a sealed envelope(s) addressed as shown below for collection and delivery by an overnight delivery carrier with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the following day by an overnight delivery carrier.

☐ (BY E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail address shown below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ (BY FACSIMILE TRANSMISSION) by telefaxing a true copy of said document(s) at \_\_\_\_\_, \_\_\_\_\_m. on the date stated above to the addressee(s) and number(s) shown below. A transmission report was properly issued by the transmitting facsimile machine and is attached hereto. The transmission was reported as completed and without error.

☐ (BY PERSONAL SERVICE) I caused such envelope(s) to be hand-delivered to the addressee(s) shown below. A proof of service signed by the authorized courier will be filed forthwith.

1 ☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the  
2 foregoing is true and correct.

3 ☐ (FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court  
4 at whose direction the service was made.

5   
6 COLLEEN PASSMORE

7 Picon v. County of San Mateo et al., - CIV467161

8 NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE

9 Ayanna L. Jenkins-Toney  
10 225 Bush Street, 16<sup>th</sup> Floor  
11 San Francisco, CA 94104

ATTORNEY FOR PLAINTIFF:  
Isolina Picon

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MODE = MEMORY TRANSMISSION

START=DEC-14 10:31

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STN NO.	COMM.	ONE-TOUCH ABBR NO.	STATION NAME/EMAIL ADDRESS/TELEPHONE NO.	PAGES	DURATION
001	OK	3	914154644975	033/033	00:06:08

-SMC COUNTY COUNSEL -

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- \*\*\*\*\*

650 363 4034- \*\*\*\*\*



# FAX TRANSMISSION

COUNTY OF SAN MATEO  
OFFICE OF THE COUNTY COUNSEL  
400 COUNTY CENTER, 6<sup>TH</sup> FLOOR  
REDWOOD CITY, CA 94063

DATE: December 14, 2007

TO: Ayanna L. Jenkins

FAX NUMBER: (415) 464-4975

FROM: Rebecca M. Archer  
Telephone: (650) 363-4686  
Facsimile: (650) 363-4034

PAGES incl. cover: 34

RE: Picon v. County of San Mateo et al.,

COMMENTS: See attached.

**FAX OPERATOR:**

If you do not receive all pages or if the copy is not legible, please call the fax operator at  
County Counsel Office of the County of San Mateo at (650) 363-4250 as soon as possible.

**CONFIDENTIALITY NOTICE:** This transmittal page and the documents accompanying this telecopy transmission contain confidential information belonging to the sender which is legally privileged. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or taking of any action in reliance on the contents of this telecopied information is strictly prohibited. If you received this telecopy in error, please immediately notify us by telephone to arrange for return of the original documents to us.



1 **AYANNA L. JENKINS-TONEY**, CSB # 224847  
2 225 Bush Street, 16<sup>th</sup> Floor  
3 San Francisco, CA 94104  
4 (415) 464-4974 Telephone  
5 (415) 464-4975 Facsimile

6 Attorney for Plaintiff Isolina Picon

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON,

Plaintiff,

vs.

COUNTY OF SAN MATEO, ROBERT

FOUCRAULT, individually and as Coroner,

SAN MATEO COUNTY

Defendants

Case No.: CIV 467161

**OPPOSITION/ RESPONSE TO COUNTY  
OF SAN MATEO'S EX PARTE  
APPLICATION MOTION TO STRIKE AS  
NON CONFORMING WITH  
CALIFORNIA RULES OF COURT 2.306,  
3.1201, 3.1202, 3.1206, AND SUPERIOR  
COURT OF CALIFORNIA COUNTY OF  
SAN MATEO LOCAL RULE 3.19.  
AND A REQUEST FOR ATTORNEY'S  
FEES**

**Date: December 14, 2007**

**Time: 2:00 pm**

**Dept: Law and Motion**

I.

INTRODUCTION

I, Ayanna L. Jenkins Toney counsel for plaintiff timely responded to Deputy County Counsel's request for an extension of time with which to file an answer to the properly filed and timely served complaint in a letter dated December 12, 2007. (See EXHIBIT – A). As the letter states I agreed to County Counsel's request for an extension however I did not agree to an extension if the County intended to file an adversarial motion against my client. Deputy County Counsel Rebecca Archer instantly rebuffed my attempt at civility. She rudely hung up the phone and approximately five minutes later indicated via voicemail that she intended to file an Ex Parte request with the court

1 for an extension of time to file responsive pleadings. Also, I request that the court be made aware that the initial  
2 phone call made to my office on December 10, 2007 was made after 4:30 pm and the purported email that is  
3 attached to County Counsel's moving papers was not received also the copy of the email does not indicate that it  
4 was in fact ever sent.

5  
6 II.

7  
8 SUBSTANTIVE ARGUMENT

9 County Counsel's cites in her Ex Parte Applications Memorandum of Points And Authorities that the extension is  
10 needed in order for her to attend to "*other matters*" and not for the purpose of developing additional arguments  
11 against the plaintiff. If The County is not requesting the extension of time to prepare opposition to plaintiffs'  
12 complaint then why was the offer to grant an extension to file an answer rebuffed by County Counsel Rebecca  
13 Archer? Additionally, again quoting directly from the Ex Parte Applications Memorandum Of Points And  
14 Authorities "The County Assures the Court that the arguments are well developed and need only be finalized on  
15 paper". If Ms. Archer is to be believed then the County only needs to type, file, and serve whatever responsive  
16 pleadings they intend to file and they have 3 days to do so.

17 Further, as I read the Declaration, Memorandum of Points And Authorities I am dismayed to find throughout the  
18 pleadings allegations levied against me by opposing counsel that I am doing a "disservice to the Court", by  
19 protecting my clients interests and following the proper rules and procedures required by law. Somehow due to the  
20 County Counsel's unpreparedness I and the alleged weakness of my case are somehow to blame. What is quite clear  
21 from the tone as well as the intentional and misplaced focus of County Counsel on me is that the substantive  
22 requirement of **California Rule of Court 3.1201 and 3.1202** requiring an applicant to "make an affirmative factual  
23 showing in a declaration containing competent testimony based on personal knowledge of irreparable harm,  
24 immediate danger, or any other statutory basis for granting relief ex parte", is absent.

25 Therefore the Ex Parte Application submitted by the County is substantively deficient in that it lacks the factual  
26 showing required by CRC 3.1202 necessary for the Court to grant the relief requested.

## III.

## PROCEDURAL ARGUMENT

California Rule of Court 2.306 governs, Service of papers by fax transmission. Rule 2.306 (a)(1) reads...."Agreement of parties required Service by fax transmission is permitted only if the parties agree and a written confirmation of that agreement is made". Here, Deputy County Counsel Rebecca Archer Served the required documents of CRC Rule 3.1201 via fax transmission, she did so in violation not only of CRC Rule 2.306 and Superior Court of California County of San Mateo Local Rule 3.19 Ex Parte Applications and Orders we do not have a written agreement as the rule requires. Further, as **CRC Rule 3.1206 Service of Papers** states "Parties appearing at the ex parte hearing must serve the ex parte application or any written opposition on all other parties at the first *reasonable opportunity*. Absent exceptional circumstances, no hearing may be conducted unless such service has been made.

Here as stated above Service was in proper, papers were sent via fax and they were transmitted on today a mere three hours before the scheduled hearing! In addition to the application lacks any statutory basis for relief.

This factor alone gives rise to the papers being *unreasonably* served. (See Exhibit B - County Counsel's Proof of Service Indicating fax serve only).

## IV.

## REQUEST FOR ATTORNEYS FEES

Due to Ms. Archer's willful violations of both substantive, and procedural requirements of an Ex Parte Application I am requesting Attorneys fees. Further, this hearing would not have occurred 'but for' County Counsel being unprepared to respond to the timely filed and served complaint. The intentional implications made by opposing Counsel indicate bad faith negotiations as well as his willful procedural violations of local and state court rules.

1 Therefore, I am asking the Court for an award of Attorneys fees based on my required appearance at this improperly  
2 noticed hearing and my time in hastily drafting this response to protect not only my clients interests but my own  
3 reputation which was besmirched by the declaration of Deputy County Counsel Archer. My request for Sanctions  
4 rely on California Code Of Civil Procedure Section 575.2 & 128.7.

5 The amount of fees that I am requesting is my hourly rate of \$350 X 4.5 Hours = \$1575.

6 Which is the approximate time that I needed to respond, and appear on this matter.  
7  
8  
9

10 Respectfully Submitted By;

11 December 14, 2007  
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---

14 Ayanna L. Jenkins-Toney

15 Attorney For Plaintiff Isolina Picon  
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# **EXHIBIT A**

LAW OFFICES OF  
AYANNA L. JENKINS TONEY, ESQ.

225 BUSH STREET  
16TH FLOOR  
SAN FRANCISCO, CA 94104  
(415) 439-8388 OFFICE  
(415) 439-8304 FAX

AyannaJ@msn.com

700 LARKSPUR LANDING CIRCLE  
SUITE 199  
LARKSPUR, CA 94939  
(415) 464-4974 OFFICE  
(415) 464-4975 FAX

December 12, 2007

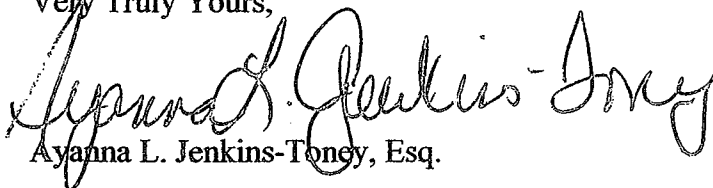
County Counsel  
County Of San Mateo  
Hall of Justice And Records, 6<sup>th</sup> floor  
400 County Center  
Redwood City, CA 94603-1662

Re: Picon, Isolina v. San Mateo County, et al. # 467161

Dear County Counsel of San Mateo,

This letter will serve to memorialize the offer that I made in response to your request for an extension of time to respond to the complaint filed on behalf of Isolina Picon. As I stated I would be amenable to an extension for the purpose of filing an *answer* only. This offer was made as a professional courtesy. However, I do not feel that it would be in my clients best interests if I were to agree to an extension so that the County could better prepare some adversarial motion, etc. against my client beyond the established customary time. This offer was communicated via telephone conversation to Rebecca Archer. The offer was rebuffed, therefore I will be expecting an answer to the timely filed and served complaint on the date specified by the Rules of Civil Procedure.

Very Truly Yours,

  
Ayanna L. Jenkins-Toney, Esq.

HP Officejet 7310  
Personal Printer/Fax/Copier/Scanner

Log 1  
Ayanina L. Jenkins Toney  
(415)464-4975  
Dec 12 2007 1:13PM

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Last Transaction

<u>Date</u>	<u>Time</u>	<u>Type</u>	<u>Identification</u>	<u>Duration</u>	<u>Pages</u>	<u>Result</u>
Dec 12	1:12PM	Fax Sent	916503634034	0:42	2	OK

**LAW OFFICES OF**

**Ayanna L. Jenkins -Toney, Esq.**

**FAX#(415) 464-4975**

**FAX TRANSMITTAL**

TO: County Counsel Of San Mateo	FROM: Ayanna L. Jenkins Toney, Esq.
FAX# (415) 464-4975	DATE: DECEMBER 12, 2007

# OF PAGES INCLUDING COVER 2

Re: Isolina Picon v. San Mateo County, et al. #467161

Truly,  
Ayanna L. Jenkins-Toney

**CONFIDENTIALITY NOTICE**

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# **EXHIBIT B**

**PROOF OF SERVICE**

I do hereby declare that I am a citizen of the United States employed in the County of San Mateo, over 18 years old and that my business address is 400 County Center, Redwood City, California. I am not a party to the within action.

On December 14, 2007, I served the following document(s):

**COUNTY OF SAN MATEO'S NOTICE OF EX PARTE APPLICATION AND APPLICATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON**

**COUNTY OF SAN MATEO'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON**

**DECLARATION OF REBECCA M. ARCHER IN SUPPORT OF COUNTY OF SAN MATEO'S EX PARTE APPLICATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON**

**PROPOSED ORDER GRANTING COUNTY OF SAN MATEO'S EX PARTE APPLICATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON**

on all other parties to this action by placing a true copy of said document(s) in a sealed envelope in the following manner:

- ☐ (BY U.S. MAIL) by placing a true copy of said document(s) in a sealed envelope(s) addressed as shown below for collection and mailing at Redwood City, California following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
- ☐ (BY OVERNIGHT DELIVERY) by placing a true copy of said document(s) in a sealed envelope(s) addressed as shown below for collection and delivery by an overnight delivery carrier with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the following day by an overnight delivery carrier.
- ☐ (BY E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail address shown below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- ☒ (BY FACSIMILE TRANSMISSION) by telefaxing a true copy of said document(s) at \_\_\_\_\_, \_\_\_\_m. on the date stated above to the addressee(s) and number(s) shown below. A transmission report was properly issued by the transmitting facsimile machine and is attached hereto. The transmission was reported as completed and without error.
- ☐ (BY PERSONAL SERVICE) I caused such envelope(s) to be hand-delivered to the addressee(s) shown below. A proof of service signed by the authorized courier will be filed forthwith.

- 1 ☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the  
2 foregoing is true and correct.  
3 ☐ (FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court  
4 at whose direction the service was made.

5   
COLLEEN PASSMORE

6 Picon v. County of San Mateo et al., - CIV467161

7 **NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE**

8  
9 Ayanna L. Jenkins-Toney  
10 225 Bush Street, 16<sup>th</sup> Floor  
San Francisco, CA 94104

ATTORNEY FOR PLAINTIFF:  
Isolina Picon

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MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)  
By: John D. Nibbelin, Deputy (SBN 184603)  
By: Rebecca M. Archer, Deputy (SBN 202743)  
Hall of Justice and Records  
400 County Center, 6<sup>th</sup> Floor  
Redwood City, CA 94063  
Telephone: (650) 363-4686  
Facsimile: (650) 363-4034

Attorneys for Defendants  
COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individually and as Coroner, SAN  
MATEO COUNTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON

Plaintiffs,

vs.

COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

Defendants.

Case No. 467161

PROOF OF SERVICE

**EXHIBIT C**

## LexisNexis® Total Research System

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Source: &gt; /... / &gt; CA - California State &amp; Federal Court Rules - Selected Documents

TOC: &gt; &gt; &gt; &gt; Rule 2.306. Service of papers by fax transmission

Terms: 2.306 ( )

*Cal Rules of Court, Rule 2.306*

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## CALIFORNIA RULES OF COURT (Reorganized and Effective January 1, 2007)

## Title 2. Trial Court Rules

## Division 3. Filing and Service

## Chapter 3. Filing and Service by Fax

## Cal Rules of Court, Rule 2.306 (2007)

NOTICE: This rule is effective January 1, 2007. For the text of this rule as it read prior to the 2007 revision, see

**Rule 2.306. Service of papers by fax transmission****(a) Service by fax**

**(1) Agreement of parties required** Service by fax transmission is permitted only if the parties agree and a written confirmation of that agreement is made.

**(2) Service on last-given fax number** Any notice or other document to be served must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document that the party has filed in the case and served on the party making service.

(Subd (a) amended and lettered effective January 1, 2007; adopted as part of subd (b) effective March 1, 1992.)

**(b) Transmission of papers by court** A court may serve any notice by fax in the same manner that parties may serve papers by fax.

(Subd (b) adopted effective January 1, 2007.)

**(c) Notice period extended** Except as provided in (d), any prescribed period of notice and any right or duty to do any act or make any response within any prescribed period or on a date certain after the service of a document served by fax transmission is extended by two court days.

(Subd (c) amended and lettered effective January 1, 2007; adopted as part of subd (b)

effective March 1, 1992.)

**(d) Extension inapplicable to certain motions** The extension provided in (c) does not apply to extend the time for the filing of:

- (1) A notice of intent to move for new trial;
- (2) A notice of intent to move to vacate a judgment under  
; or
- (3) A notice of appeal.

(Subd (d) amended and lettered effective January 1, 2007; adopted as part of subd (b) effective March 1, 1992.)

**(e) Availability of fax** A party or attorney agreeing to accept service by fax must make his or her fax machine generally available for receipt of served documents between the hours of 9 a.m. and 5 p.m. on days that are not court holidays under

. This provision does not prevent the party or attorney from sending other documents by means of the fax machine or providing for normal repair and maintenance of the fax machine during these hours.

(Subd (e) amended effective January 1, 2007; previously amended effective May 1, 1998; previously amended effective July 1, 1997.)

**(f) When service complete** Service by fax is complete on transmission of the entire document to the receiving party's fax machine. Service that is completed after 5 p.m. is deemed to have occurred on the next court day. Time is extended as provided by this rule.

(Subd (f) amended effective January 1, 2007.)

**(g) Proof of service by fax** Proof of service by fax may be made by any of the methods provided in , except that:

- (1) The time, date, and sending fax machine telephone number must be used instead of the date and place of deposit in the mail;
- (2) The name and fax machine telephone number of the person served must be used instead of the name and address of the person served as shown on the envelope;
- (3) A statement that the document was sent by fax transmission and that the transmission was reported as complete and without error must be used instead of the statement that the envelope was sealed and deposited in the mail with the postage thereon fully prepaid;
- (4) A copy of the transmission report must be attached to the proof of service and the proof of service must declare that the transmission report was properly issued by the sending fax machine; and
- (5) Service of papers by fax is ineffective if the transmission does not fully conform to these provisions.

(Subd (g) amended effective January 1, 2007.)

✶ History:

Rule **2.306** amended and renumbered effective January 1, 2007; adopted as rule 2008 effective March 1, 1992; previously amended effective July 1, 1997, and July 1, 1997.

#### Collateral References:

Cal Civil Procedure Before Trial (CEB)§§ 25.1 et seq.

Rutter, Cal Prac Guide, Family Law §§ 3:420 et seq.

Source: [...>/.../> CA - California State & Federal Court Rules - Selected Documents](#)

TOC: [...>...>...> Rule 2.306. Service of papers by fax transmission](#)

Terms: **2.306** (Full Text) | [Download](#) | [Print](#)

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CALIFORNIA RULES OF COURT (Reorganized and Effective January 1, 2007)

### Title 3. Civil Rules

#### Division 11. Law and Motion

## Chapter 4. Ex Parte Applications

Cal Rules of Court, Rule 3.1201 (2007)

### **Rule 3.1201. Required documents**

**A request for ex parte relief must be in writing and must include all of the following:**

- (1) An application containing the case caption and stating the relief requested;
- (2) A declaration in support of the application making the factual showing required under rule 3.1202(c);
- (3) A declaration based on personal knowledge of the notice given under rule 3.1204;
- (4) A memorandum; and
- (5) A proposed order.

## History:

Rule 3.1201 adopted effective January 1, 2007.

**Collateral References:**

Matthew Bender (R) Practice Guide: Cal. Debt Collection and Enforcement of Judgments §§ 1.44, 1.53[7], 4.13, 4.21, 8.24, 8.54, 8.62[2], 8.62[3], 8.83.

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*Cal Rules of Court, Rule 3.1202*

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## CALIFORNIA RULES OF COURT (Reorganized and Effective January 1, 2007)

## Title 3. Civil Rules

## Division 11. Law and Motion

## Chapter 4. Ex Parte Applications

## Cal Rules of Court, Rule 3.1202 (2007)

**Rule 3.1202. Contents of application**

**(a) Identification of attorney or party** An ex parte application must state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephone number of the party if known to the applicant.

**(b) Disclosure of previous applications** If an ex parte application has been refused in whole or in part, any subsequent application of the same character or for the same relief, although made upon an alleged different state of facts, must include a full disclosure of all previous applications and of the court's actions.

**(c) Affirmative factual showing required** An applicant must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte.

(Subd (c) amended effective January 1, 2007.)

## History:

Rule 3.1202 amended effective January 1, 2007; adopted effective January 1, 2007.

Source: &gt; / ... / &gt; CA - California State &amp; Federal Court Rules

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*Cal Rules of Court, Rule 3.1206*

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## CALIFORNIA RULES OF COURT (Reorganized and Effective January 1, 2007)

## Title 3. Civil Rules

## Division 11. Law and Motion

## Chapter 4. Ex Parte Applications

## Cal Rules of Court, Rule 3.1206 (2007)

**Rule 3.1206. Service of papers**

Parties appearing at the ex parte hearing must serve the ex parte application or any written opposition on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, no hearing may be conducted unless such service has been made.

**History:**

Rule 3.1206 adopted effective January 1, 2007.

Source: &gt; / ... / &gt; CA - California State &amp; Federal Court Rules

TOC: &gt; &gt; &gt; Rule 3.1206. Service of papers

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Date/Time: Wednesday, December 12, 2007 - 7:01 PM EST

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Superior Court of California, County of San Mateo

(b) Timing. A motion to quash service of summons on the ground of lack of jurisdiction, pursuant to CCP§ 418.10(a), must be made not less than three days nor more than seven days after the filing of the notice. The hearing on the motion shall be automatically set on the first Law and Motion date, which is not less than three, nor more than seven days after the filing of the notice. When a demurrer, a motion pursuant to CCP '1170.5(b) and (c) or any other motion or pleading is filed other than an answer, the hearing thereon shall be automatically set on the first Law and Motion Calendar following the date of the filing, if that calendar is five or more days after filing. If not, the hearing shall be set for the second Law and Motion Calendar following the date of the filing. (See CCP ' 1005.) Motions for summary judgment or judgment on the pleadings shall be calendared on the first Law and Motion Calendar occurring five or more days after personal service of the notice of motion or ten or more days after service by mail. Should any party notice a demurrer, motion for summary judgment or other motion on a date beyond the time set forth in this Rule, any other party may apply for an ex parte order setting an earlier hearing date.

(Adopted, effective January 1, 2000).

### 3.16 Motions to Continue Arbitration

- a) Reference CRC, rule 3.817.
- (b) Declaration in support. Any application to continue an arbitration hearing shall be supported by a declaration showing:
  - (1) The date the arbitrator was assigned;
  - (2) The date on which the arbitration hearing is currently set;
  - (3) The reason for and period of any previous continuance;
  - (4) Good cause under the standards recommended in Section Nine of the Standards of Judicial Administration for the continuance and;
  - (5) Whether all parties and the arbitrator have stipulated to the proposed continuance.

(Adopted, effective January 1, 2000) (Amended, effective January 1, 2007).

### Rule 3.17 Motions After Trial

All motions after trial until judgment is final shall be heard in the department where the case was tried at a time designated by the judge of that department.

(Adopted, effective July 1, 1996)

### Rule 3.18 Motions to Reconsider

Reference CCP '1008.

(Adopted, effective July 1, 1996) (Amended, effective January 1, 2000)

### 3.19 Ex Parte Applications and Orders

- a) Reference CRC, rule 3.1200-3.1207 and 2.306.

Superior Court of California, County of San Mateo

b) Time and Place. Ex parte hearings are held from 2:00 to 3:30 P.M. Monday through Friday. In general, all ex parte applications shall be presented in the Law and Motion Department except for the following, which shall be presented to the Presiding Judge:

- (1) Motions affecting a trial date including preference setting and motions to continue trial
- (2) Writs of Mandate and Prohibition
- (3) Temporary Restraining Orders and Orders to Show Cause re Preliminary Injunction
- (4) Motions to continue arbitration

c) Notice. Notice of an ex parte application may be given by fax if the parties have an existing fax service agreement and the proof of service complies with the requirements of CRC 2.306.

(Adopted, effective January 1, 2000) (Amended, effective January 1, 2007).



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MATEO COUNTY

**ENDORSED FILED**  
**SAN MATEO COUNTY**  
**DEC 14 2007**

Clerk of the Superior Court  
By M. MARLOWE  
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON

Plaintiffs,

vs.

COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

Defendants.

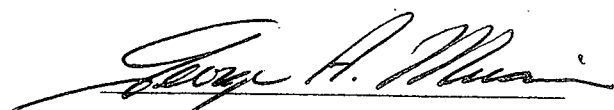
Case No. 467161

**[PROPOSED] ORDER GRANTING  
COUNTY OF SAN MATEO'S EX PARTE  
APPLICATION FOR EXTENSION OF  
TIME TO RESPOND TO COMPLAINT OF  
ISOLINA PICON**

On DECEMBER 14, 2007 Counsel for defendants County of San Mateo and Robert Foucrault, Coroner, Rebecca M. Archer, appeared before this Court ex-parte to request an extension of time to respond to plaintiff's complaint. Ayanna L. Jenkins-Toney appeared on behalf of plaintiff, Isolina Picon. Having reviewed the papers submitted and good cause appearing the Court GRANTS defendants' application and extends defendants' time to respond to the complaint by 15 days up until and including January 2, 2008.

IT IS SO ORDERED:

12/14/07



Judge of the Superior Court

Case No. 467161

**[PROPOSED] ORDER GRANTING COUNTY OF SAN MATEO'S EX PARTE APPLICATION FOR  
EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON**



MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)  
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MATEO COUNTY

ENDORSED FILED  
SAN MATEO COUNTY

DEC 30 2007

Clk of the Superior Court  
By E. LEBLANC  
County Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON

Plaintiff,

vs.

COUNTY OF SAN MATEO, ROBERT  
FOUCAULT, individual and as Coroner, SAN  
MATEO COUNTY

Defendants.

Case No. 467161

DEFENDANTS COUNTY OF SAN MATEO  
AND ROBERT FOUCAULT'S NOTICE  
OF DEMURRER AND DEMURRER TO  
COMPLAINT OF ISOLINA PICON

Hearing:

Date: January 29<sup>th</sup>, 2008  
Time: 9:00 a.m.  
Dept: Law and Motion

NOTICE OF DEMURRER

TO PLAINTIFF AND TO HER ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on January 29<sup>th</sup>, 2008 at 9:00 a.m. or as soon thereafter as the matter may be heard in the Law and Motion Department of the San Mateo County Superior Court, located at 400 County Center, Redwood City, California, 94063, DEFENDANTS COUNTY OF SAN MATEO and ROBERT FOUCAULT will move and hereby does move the court for an order sustaining its demurrer to the complaint.

This demurrer is based upon this notice, the attached Memorandum of Points and Authorities filed in support thereof, the pleadings, records and files in this action, other documents that may be

Case No. 467161

DEFENDANTS COUNTY OF SAN MATEO AND ROBERT FOUCAULT'S NOTICE OF DEMURRER  
AND DEMURRER TO COMPLAINT OF ISOLINA PICON

judicially noticed and upon such oral argument that may be presented at the hearing on this demurrer.

DEMURRER

Defendant COUNTY OF SAN MATEO and ROBERT FOUCRAULT demur to the Complaint filed by Plaintiff Isolina Picon on each of the following grounds:

Demurrer to First Cause of Action – Denial of Quasi Property Right – The Right to Control  
Disposition of the Remains of a Deceased Person

The First Cause of Action fails to state a claim as required by Code of Civil Procedure § 430.10(e) because no right of plaintiff was denied. Moreover, defendants are immune from liability for discretionary acts under Government Code § 820.2.

Demurrer to Second Cause of Action for Breach of a Mandatory Duty

The Second Cause of Action fails to state a claim as required by Code of Civil Procedure § 430.10(e) because it fails to allege any mandatory duty of defendants owed to plaintiff. Moreover, defendants are immune from liability for discretionary acts under Government Code § 820.2.

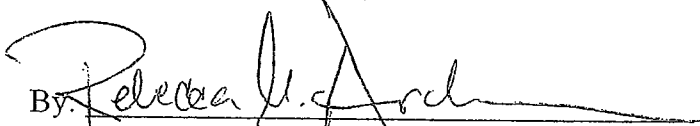
Demurrer to Third Cause of Action for Negligent Infliction of Emotional Distress

The Third Cause of Action fails to state a claim as required by Code of Civil Procedure § 430.10(e) because negligent infliction of emotional distress is not an independent tort, but rather is a form of negligence, and plaintiff cites to no statutory duty of defendants under the Government Claims Act giving rise to liability for negligence. Moreover, defendants are immune from liability for discretionary acts under Government Code § 820.2.

Dated: December 28, 2007

Respectfully submitted,

MICHAEL P. MURPHY, COUNTY COUNSEL

By:   
Rebecca M. Archer, Deputy

Attorneys for Defendants  
COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

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7 MATEO COUNTY

8  
9  
10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 IN AND FOR THE COUNTY OF SAN MATEO

12 ISOLINA PICON

13 Plaintiff,

14 vs.

15 COUNTY OF SAN MATEO, ROBERT  
16 FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

17 Defendants.  
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Case No. 467161

DEFENDANTS COUNTY OF SAN  
MATEO AND ROBERT  
FOUCRAULT'S MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT OF DEMURRER TO  
COMPLAINT OF ISOLINA PICON

Hearing:

Date: January 29, 2008  
Time: 9:00 a.m.  
Dept: Law and Motion

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## I. INTRODUCTION

Plaintiff's son, Nicholas Picon, died suddenly on October 25, 2006 at the age of 23 as a result of heart trouble. The San Mateo County Coroner's office investigated his death and performed an autopsy. When conducting an autopsy of Plaintiff's son, the County Coroner retained his heart to further investigate the cause of death. Plaintiff claims that she was not informed, and did not discover, that the heart was missing until after she had buried her son on October 30, 2006. Upon her request, the heart was returned to her. Plaintiff brings three causes of action against the County and the Coroner: 1) denial of the right to control the disposition of remains of her deceased son; 2) breach of a mandatory duty; and 3) negligent infliction of emotional distress. Each of these claims, however, fail to state a cause of action against the County or the Coroner.

The gravamen of her complaint is that the Coroner should not have retained her son's heart without first notifying her and obtaining her consent to do so. However, the Coroner has absolutely no obligation to notify or obtain consent of the next of kin in order to remove or retain organs for the purposes of his investigation. Indeed, the converse is true: the Coroner has the statutory *right – without* notifying or obtaining the consent of the next-of-kin – to (1) “retain those tissues of the body removed at the time of the autopsy as may, in his or her opinion, be necessary or advisable to the inquiry into the case, or for the verification of his or her findings” and to (2) retain the organs for purposes training and research. Cal. Gov. Code §§ 27491.4(a), 27491.45(a)(1).

Plaintiff's first cause of action for denial of the right to control the disposition of remains of a deceased person is fatally flawed because the complaint acknowledges that the Coroner fulfilled his obligation to return the body for purposes of burial. That is all that the law requires. There is no right to bury a fully intact body. Due to the nature of an autopsy such a requirement would be impossible to satisfy.

Her second cause of action for breach of a mandatory duty is similarly deficient. The statutes which allegedly form the basis for this action – Government Code §§ 27491.4 and 27491.45 and Health and Safety Code § 7150 – do not reveal *any* mandatory duty of the Coroner or the County. Indeed, as explained above, the cited sections give the Coroner authority to act as he did.

Her third cause of action for negligent infliction of emotional distress fails because no such cause

1 of action exists. Emotional distress is a form of damages attributable to negligence, the elements of  
2 which plaintiff has not and cannot allege.

3 Finally, as to each cause of action, the Coroner, and the County, as his employer, are immune to  
4 suit for the exercise of his discretion under the Government Code. Cal. Gov. Code § 820.2. Defendants,  
5 the County of San Mateo and the Coroner, therefore respectfully request that the Court sustain their  
6 demurrer, without leave to amend.

## 7 II. ALLEGATIONS OF COMPLAINT

8 Plaintiff alleges that, when conducting an autopsy of her son, the County Coroner retained her  
9 son's heart to further investigate the cause of death without advising her or asking her for permission to  
10 do so. Compl. at pp. 4-6; Exh. A at p. 5. She claims that she was not informed, and did not discover, that  
11 the heart was missing until after she had buried her son on October 30, 2006. *Id.* She attaches to her  
12 complaint an October 26, 2006 Autopsy Report that states the "cardiac specimen is retained to permit  
13 further detailed examination." Comp.Exh. A at p. 5.

14 As to the first cause of action, she alleges that the Coroner denied her a *quasi* property right by  
15 retaining her son's heart without informing her or obtaining her consent to do so. Compl. at p. 4. As to  
16 the second cause of action, she alleges that the Coroner's actions allegedly violated a mandatory duty  
17 imposed on the Coroner by Government Code §§ 27491.4(a) and 27491.45(a)(2) as well as Health and  
18 Safety Code § 7150 *et seq.* Compl. at p. 5. As to the third cause of action, she alleges that the Coroner's  
19 actions in failing to return the heart was a breach of the Coroner's obligations to Plaintiff, and that such a  
20 breach caused Plaintiff to suffer emotional distress. Compl. at p. 6.

## 21 III. ARGUMENT

### 22 A. Standard of Review

23 The court may sustain a demurrer without leave to amend where the complaint fails to state facts  
24 sufficient to state a cause of action and where there is no reasonable possibility that the defect can be  
25 cured by amendment. *Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318. The burden of proving such  
26 reasonable possibility is squarely on the plaintiff. *Id.* To survive a demurrer, the existence of a  
27 mandatory duty must be specifically pleaded. *Lehto v. City of Oxnard* (1985) 171 Cal.App.3d 285, 292  
28 (must specifically allege the particular enactment that creates the mandatory duty).

Where the Complaint attaches documents relevant to its pleading, the court may consider them a part of the pleading and, they in fact take precedence over inconsistent allegations in the complaint itself. *Holland v. Morse Diesel Int'l, Inc.* (2001) 86 Cal.App.4<sup>th</sup> 1443, 1447 (facts appearing in exhibits attached to the complaint are given precedence over inconsistent allegations in the complaint); *see also Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal. App. 4<sup>th</sup> 500, 504-05.

**B. Plaintiff Fails To State A Cause Of Action For Breach Of The Right To Control The Disposition Of The Remains Of A Deceased Person.**

Plaintiff cannot allege facts to state a cause of action against the County or the Coroner for deprivation of a right to control the disposition of the remains of a deceased person. While there is a temporary right of possession of a dead body, it is only for the *limited* purposes of burial. *Enos v. Snyder* (1900) 131 Cal. 68 (finding that while there is no property right in a dead body, a limited right to temporary possession of the dead body for purposes of burial belongs to the next-of-kin.); *Huntley v. Zurich* (1929) 100 Cal.App. 201, 208 (same). Plaintiff does not allege that she was prevented from burying the body of her son. Rather, her complaint contradicts any such allegation by alleging that she was able bury her son on October 30, 2006. Compl.at p. 4. Therefore she has no cause of action for breach of a right to control the remains of her deceased son. *Holm v. Superior Court* (1986) 187 Cal.App.3d 1241, 1246 (only property right in body of deceased is limited to determining who shall have its custody for burial); *Gray v. Southern Pac. Co.* (1937) 21 Cal.App.2d 240, 246-247 (right to possession of the body is a right that is limited to custody for the purpose of burial even where organs are retained for further investigation: "The action is not one for conversion, nor could it be, as the law recognizes no right of property as such in the dead body of a human being. The right is to the possession of the body, and is one recognized for the purpose of determining who shall have its custody for the purpose of burial.")

Nor can plaintiff bring a cause of action based upon the fact that her son's body was not intact when it was returned to her. There is no authority for expanding the limited right to temporary possession of a corpse for purpose of burial to a right to receive the body intact. Indeed the law states the converse – that a coroner has the *right* to retain any organs following an autopsy that he deems necessary to his investigation *or* for purposes of research or coroner training. Government Code § 27491.4

1 provides in pertinent part:

2 (a) For purposes of inquiry the coroner shall, within 24 hours or as soon as  
3 feasible thereafter, where the suspected cause of death is sudden infant  
4 death syndrome and, in all other cases, the coroner may, in his or her  
5 discretion, *take possession of the body*, which shall include the authority to  
6 exhume the body, order it removed to a convenient place, and make or  
7 cause to be made a postmortem examination or autopsy thereon, and make  
8 or cause to be made an analysis of the stomach, stomach contents, blood,  
9 organs, fluids, or tissues of the body. . . . *The coroner shall have the right  
10 to retain only those tissues of the body removed at the time of the autopsy  
11 as may, in his or her opinion, be necessary or advisable to the inquiry into  
12 the case, or for the verification of his or her findings.* No person may be  
13 present during the performance of a coroner's autopsy without the express  
14 consent of the coroner. (Emphasis added).

9 In addition Government Code § 27491.45(a)(1) provides:

10 (a)(1) *The coroner shall have the right to retain parts of the body*, as  
11 defined in subdivision (g) of Section § 7150.1 of the Health and Safety  
12 Code, removed at the time of autopsy or acquired during a coroner's  
13 investigation as may, in the opinion of the coroner, be necessary or  
14 advisable for *scientific investigation and training*. The coroner may employ  
15 or use outside laboratories, hospitals, or research institutions in the conduct  
16 of the coroner's scientific investigation or training. (Emphasis added.)

14 The Coroner's discretionary right to retain body parts for investigative and training purposes, without  
15 regard to notification, consent, or time limits on possession of the removed organ is inconsistent with any  
16 purported obligation to return an intact corpse to the next-of-kin.

17 Defendants anticipate that Plaintiff will point to cases in which a mortuary is held liable for  
18 mishandling human remains. *See, e.g., Christiansen v. Superior Ct.* (1991) 54 Cal.3d 868 (finding that  
19 family members of decedents had standing to seek damages for emotional distress negligently caused by  
20 mortuaries and crematoriums which allegedly mishandled human remains). Such citation would be  
21 inapposite. The case law is clear that the unique duties of a coroner make it unreasonable to impose  
22 standards of care similar to those imposed on the general public or on those under contract for funereal  
23 services. *Sabow v. United States* (9<sup>th</sup> Cir. 1996) 93 F.3d 1445, 1448 (holding that where during course of  
24 investigation corpse left to decompose in sun for seven hours, government had no duty of care in  
25 handling human remains under California law: "the handling of an individual's remains during an  
26 investigation into his death [is] different from mortuary services . . . [and] the [government] was under no  
27 contractual obligation to treat decedent's remains in a certain manner during the investigation."); *also see*  
28 *Gray v. Southern Pac. Co.* (1937) 21 Cal.App.2d 240, 245-246 (finding no cause of action for mutilation

1 of corpse against a coroner.) In sum, because there is no property right in a dead body, other than the  
 2 limited right to temporary possession for purposes of burial (deemed in case law to be a *quasi* property  
 3 right), Plaintiff's first cause of action fails.

4  
 5 **C. The Complaint Fails to State A Cause of Action Because The County and the  
 6 Coroner Are Immune From Liability.**

7 In addition, given that the Coroner has broad discretion to remove and retain body parts without  
 8 any requirement to notify or obtain the consent of the next-of-kin he is immune from liability for the  
 9 exercise of that discretion. Cal. Gov. Code § 820.2 (a public employee or official is not liable for an  
 10 injury resulting from his act or omission where the act or omission was the result of the exercise of the  
 11 discretion vested in him, whether or not such discretion be abused.) Indeed, in *Gray v. Southern Pac.*  
 12 *Co.*, *supra*, at 21 Cal.App.2d 245-246, the court found that where the coroner was lawfully authorized to  
 13 perform an autopsy, there could be no cause of action for damages against the coroner for exercise of his  
 14 discretion in doing so, and stated:

15 There can be no liability for an act required by law ... '[t]he mere  
 16 allegation in the petition that in performing work which was clearly in the  
 17 scope of his duties of the officer acted maliciously, wantonly, and  
 18 unlawfully does not state an actionable wrong. Bad motive, by itself, then,  
 19 is no tort. Malicious motives make a bad act worse, but they cannot make  
 20 that a wrong which in its own essence is lawful. ... If, as we think we have  
 21 shown, the complaint does not show the autopsy to have been unlawful, the  
 22 mental and physical shock and distress caused thereby to the plaintiff –  
 23 which is the gravamen of the action – gave rise to no cause of action.  
 24 (internal citations and quotations omitted.)

25 Moreover, the Coroner cannot be liable for the manner in which he chooses to exercise his discretion.  
 26 See, e.g., *Hunt v. Board of Chiropractic Examiners* (1948) 87 Cal.App.2d 98, 101 (where statute imposes  
 27 discretion to act under certain circumstances, mandate will not lie to compel the exercise of such  
 28 discretion in a particular manner).

29 The County is also immune as a public entity is not liable for torts of its employee if the employee is  
 30 immune from liability. Government Code § 815.2(b) states: "Except as otherwise provided by statute, a  
 31 public entity is not liable for an injury resulting from an act or omission of an employee of the public  
 32 entity where the employee is immune from liability." Therefore, it follows that Plaintiff cannot state any  
 33 cause of action against the Coroner or the County under any tort theory that would overcome the

immunities conferred by the Government Code. Plaintiff, therefore, will be unable to state any cause of action against the Coroner or the County related to his exercise of discretion under the cited statutes and the facts of this case that could overcome the immunity conferred by Government Code § 820.2.

**D. Plaintiff Fails to State a Cause of Action For Breach of a Mandatory Duty.**

Whether a statute “creates a mandatory duty is a question of law” for the courts. *Creason v. Department of Health Services* (1998) 18 Cal.4<sup>th</sup> 623, 631. In the case of a mandatory duty, the mandatory duty must be *specifically* pled. *Lehto, supra*, 171 Cal.App.3d at 292. In order to plead such a cause of action, the statute at issue “*must be obligatory*, rather than merely discretionary or permissive; it must *require*, rather than merely authorize or permit that a particular action be taken or not taken.” *Haggis v. City of Los Angeles* (2000) 22 Cal.4<sup>th</sup> 490, 498 *citing Morris v. County of Marin* (1977) 18 Cal.3d 901, 907 (emphasis added). Specifically, Plaintiff must allege that: (1) the statute which was violated imposes a mandatory duty, (2) the statute was intended to protect against the type of harm suffered, and (3) breach of the statute’s mandatory duty was a proximate cause of the injury suffered. *Washington v. County of Contra Costa*, (1995) 38 Cal.App.4<sup>th</sup> 890, 895. “A Plaintiff must plead with particularity every fact essential to the existence of statutory liability in order to state a cause of action against a public entity.” *Keyes v. Santa Clara Valley Water Distr.* (1982) 128 Cal.App.3d 882, 886. The complaint fails to meet even the first prong of the test; neither Health and Safety Code § 7150 *et seq.* nor Government Code §§ 27491.4(a) and 27491.45(a)(2) contain any mandatory duty imposed on the County or Coroner whatsoever.<sup>1</sup> Comp. p. 5. These statutes instead create an authorization for the Coroner to take discretionary acts. In any event, nothing in these statutes imposes a duty on the Coroner to advise or seek the consent of *anyone* before removing or retaining a body part in connection with the investigation of a cause of death. Therefore, the alleged failure of the Coroner to notify or seek the consent of Plaintiff cannot be actionable. *Washington, supra* 38 Cal.App.4<sup>th</sup> at 895.

<sup>1</sup> Because the complaint fails to cite to any *mandatory* duty under the first prong of the test, there is no need to reach the other two prongs.

1                   1.       **Health and Safety Code § 7150 Does Not Create A Mandatory Duty.**

2                   Health and Safety Code 7150 *et seq.* is the codification of the Uniform Anatomical Gift Act.  
3                   Plaintiff cites to the entire Act without specifying the specific mandatory duty (or even the precise  
4                   section of the Act) that she alleges the County or the Coroner violated. This is insufficient to state a  
5                   cause of action as the existence of a mandatory duty must be *specifically* plead. *Lehto, supra* 171  
6                   Cal.App.3d at 292 (cause of action for breach of mandatory duty must specifically allege the *particular*  
7                   enactment that creates the mandatory duty). Without knowing what section of the entire Act plaintiff  
8                   believes imposed a mandatory duty on the Coroner or the County, the County cannot respond to  
9                   allegations of a breach.

10                  Notwithstanding this lack of specificity, even a cursory review of the Act shows that there is *no*  
11                  provision of the Uniform Anatomical Gift Act that imposes a mandatory duty on Defendants under the  
12                  facts of this case.<sup>2</sup>

13                               2.       **Government Code §§ 27491.4(a) and 27491.45(a)(2) Do Not Impose a**  
14                               **Mandatory Duty.**

15                  Plaintiff contends that Defendants breached a mandatory duty allegedly contained in Government  
16                  Code §§ 27491.4(a) and 27491.45(a)(2). However, there is no mandatory duty contained in those  
17                  sections – only discretionary power.

18                  Section 27491.4(a) vests the Coroner with the *right* to retain body parts “removed at the time of  
19                  the autopsy as may, in his or her opinion, be necessary or advisable to the inquiry into the case, or for the  
20                  verification of his or her findings.” The only limitation on that right is that the retention of such samples,  
21                  *in the Coroner’s opinion*, be necessary *or advisable* to the inquiry in the case, or for the *verification* of  
22                  the Coroner’s findings. *Id.* This language creates broad discretion in the Coroner to determine the cause  
23                  of death of an individual and to retain those body parts necessary to that investigation. The autopsy  
24                  report, attached to the complaint, clearly states that the heart was retained to permit further investigation.

25  
26                  <sup>2</sup> Plaintiff may argue that Health and Safety Code § 7151.5 creates a mandatory duty not to remove or  
27                  donate body parts without the consent of the next-of-kin. This would be an incorrect reading of the law.  
28                  Section 7151.5 actually vests *discretion* in the coroner to remove and release body parts for the purpose  
                  of transplantation, therapy or reconditioning – all of which are inapplicable to this complaint.

Comp., Exh. A at p. 5; *see Holland, supra*, 86 Cal.App.4<sup>th</sup> 1443, 1447 (facts in exhibits given precedence over inconsistent allegations in the complaint). Plaintiff's allegation, therefore, that her son's heart "had been sent to Stanford University for research purposes" is belied by the report she attaches to her complaint, and by her allegation that the heart was returned to her eight days after her initial inquiry as to whether her son's heart had been retained by the Coroner. *Id.*; Compl. at p. 5. Even if the heart had been sent to a research facility, no mandatory duty would have been breached as the Coroner has the *right* to use outside institutions for purposes of coroner research, investigation and training. § 27491.45(a)(1).

Regardless, Plaintiff cannot escape the fact that § 27491.4(a) does not by its terms create *any* duty, mandatory or otherwise, in the Coroner to advise her of, or seek her consent before, retaining body parts in the course of an autopsy. It does the opposite. It *allows* the Coroner to retain body parts at his discretion *without* notification, *without* consent, *without* limits as to how long the organ may be retained and *without* any obligation to return the body part to the next-of-kin of the deceased. §§ 27491.4 and 27491.45(a)(1).

Plaintiff's reference to § 27491.45(a)(2) is no more availing. That section sets out circumstances under which body parts retained by the Coroner may be released to "hospitals, medical, educational, research institutions, and law enforcement agencies for *noncoroner training, educational, and research purposes*." This section describes a coroner's *discretion* to release organs for noncoroner purposes; it does not impose a mandatory duty on the coroner to perform any act.

Given that the autopsy report states that it retained the heart for further investigation, there are no facts that may be pleaded that would show that the coroner did anything other than exercise his rights under § 27491.45(a)(1). Where no liability exists under substantive law, the Court may sustain a demurrer without leave to amend. *Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436.

#### **E. Plaintiff Does Not State A Cause Of Action For Negligent Infliction Of Emotional Distress.**

"Negligent infliction of emotional distress is not an independent tort, but rather is the tort of negligence involving the usual duty and causation issues." Witkin, Summary of California Law Vol. 6. Torts § 1004. Stated differently, emotional distress is one form of damage that might flow from negligence. Therefore Plaintiff cannot state a cause of action for negligent infliction of emotional distress

1 because no such cause of action exists. Moreover, Plaintiff also does not state a cause of action for  
 2 negligence as she does not allege any duty of the Coroner or the County to her. Compl. at p. 6.; *Tolan v.*  
 3 *State* (1979) 100 Cal.App.3d 980 (common law principles of negligence insufficient to allege a cause of  
 4 action against a public entity.) Nor can she. The Coroner acted pursuant to his statutory authority.

5 Regardless, and as noted above, the Coroner and the County are immune from any tort liability  
 6 under Government Code §§ 815.2(b) and 820.2.

#### 7 IV. CONCLUSION

8 Plaintiff believes that the tragic loss of her son was compounded by the knowledge that the  
 9 Coroner removed and retained her son's heart during the course of the autopsy. This, however, does not  
 10 create a cause of action against the County or the Coroner. Neither the County or the Coroner can be  
 11 liable for the removal or retention of the deceased's heart under any theory because the Coroner acted  
 12 within the scope of his statutory authority to do so. Moreover, the Coroner's actions were pursuant to his  
 13 discretionary authority and are therefore immune from suit under Government Code § 820.2. Defendants  
 14 respectfully request that the demurrer to each cause of action be sustained without leave to amend.  
 15

16 Dated: December 28, 2007

17 Respectfully submitted,

18 MICHAEL P. MURPHY, COUNTY COUNSEL

19 By:   
 20

21 Rebecca M. Archer, Deputy

22 Attorneys for Defendants  
 23 COUNTY OF SAN MATEO, ROBERT  
 24 FOUCAULT, individual and as Coroner, SAN  
 25 MATEO COUNTY

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 28

MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)  
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MATEO COUNTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON

Plaintiffs,

vs.

COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

Defendants.

Case No. 467161

**PROOF OF SERVICE BY MAIL**

1. Defendants County of San Mateo and Robert Foucrault's Notice of Demurrer and Demurrer to Complaint of Isolina Picon;
2. Defendants County of San Mateo and Robert Foucrault's Memorandum of Points and Authorities in Support of Demurrer to Complaint of Isolina Picon
3. Non-California Cases Cited in Support of Defendants County of San Mateo and Robert Foucrault's Demurrer to Complaint of Isolina Picon; and
4. [Proposed] Order Re Defendants County of San Mateo and Robert Foucrault's Demurrer to Complaint of Isolina Picon

Date: January 29, 2008  
Time: 9:00 a.m.  
Dept: Law and Motion

## PROOF OF SERVICE

I do hereby declare that I am a citizen of the United States employed in the County of San Mateo, over 18 years old and that my business address is 400 County Center, Redwood City, California. I am not a party to the within action.

On December 28, 2007, I served the following document(s):

DEFENDANTS COUNTY OF SAN MATEO AND ROBERT FOUCRAULT'S NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT OF ISOLINA PICON;

DEFENDANTS COUNTY OF SAN MATEO AND ROBERT FOUCRAULT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO COMPLAINT OF ISOLINA PICON

NON-CALIFORNIA CASES CITED IN SUPPORT OF DEFENDANTS COUNTY OF SAN MATEO AND ROBERT FOUCRAULT'S DEMURRER TO COMPLAINT OF ISOLINA PICON; and

[PROPOSED] ORDER RE DEFENDANTS COUNTY OF SAN MATEO AND ROBERT FOUCRAULT'S DEMURRER TO COMPLAINT OF ISOLINA PICON

on all other parties to this action by placing a true copy of said document(s) in a sealed envelope in the following manner:

☒ (BY U.S. MAIL) by placing a true copy of said document(s) in a sealed envelope(s) addressed as shown below for collection and mailing at Redwood City, California following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☐ (BY OVERNIGHT DELIVERY) by placing a true copy of said document(s) in a sealed envelope(s) addressed as shown below for collection and delivery by an overnight delivery carrier with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the following day by an overnight delivery carrier.

☐ (BY E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail address shown below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ (BY FACSIMILE TRANSMISSION) by telefaxing a true copy of said document(s) at \_\_\_\_, \_\_m. on the date stated above to the addressee(s) and number(s) shown below. A transmission report was properly issued by the transmitting facsimile machine and is attached hereto. The transmission was reported as completed and without error.

☐ (BY PERSONAL SERVICE) I caused such envelope(s) to be hand-delivered to the addressee(s) shown below. A proof of service signed by the authorized courier will be filed forthwith.

1 ☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the  
2 foregoing is true and correct.

3 ☐ (FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court  
4 at whose direction the service was made.

5   
6 Gayle Gull

7 Picon v. County of San Mateo et al., - CIV 467161

8 NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE

9 AYANNA L. JENKINS-TONEY, ESQ.  
10 225 BUSH STREET, 16<sup>TH</sup> FLOOR  
11 SAN FRANCISCO CA 94104

Attorney for Plaintiff  
Isolina Picon

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6 Attorneys for Defendants  
COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individually and as Coroner, SAN  
7 MATEO COUNTY  
8  
9

**RECEIVED**

**DEC 28 2007**

**SUPERIOR COURT  
CIVIL DIVISION**

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 IN AND FOR THE COUNTY OF SAN MATEO

12 ISOLINA PICON  
13

14 Plaintiff,

15 vs.

16 COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
17 MATEO COUNTY  
18

19 Defendants.  
20  
21  
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Case No. 467161

**[PROPOSED] ORDER RE DEFENDANTS  
COUNTY OF SAN MATEO AND ROBERT  
FOUCRAULT'S DEMURRER TO  
COMPLAINT OF ISOLINA PICON**

1 The demurrer of Defendants County of San Mateo and Robert Foucrault (Collectively "County of  
2 San Mateo") came on regularly for hearing on January <sup>30</sup>~~29~~, 2008, at 9:00 a.m. in the Law and Motion  
3 Department of the Superior Court of the County of San Mateo, the Honorable \_\_\_\_\_,  
4 presiding. Defendants appeared by and through their attorney, Deputy County Counsel, John Nibbelin.  
5 Plaintiff appeared by and through her attorney, Ayanna Jenkins-Toney.

6 The Court, having reviewed the Demurrer, and all papers filed in connection thereto, and having  
7 heard the oral argument of the parties, the Court, HEREBY ORDERS as follows:

- 8 1. The Court SUSTAINS Defendant County of San Mateo's Demurrer to the FIRST  
9 CAUSE OF ACTION without leave to amend;
- 10 2. The Court SUSTAINS Defendant County of San Mateo's Demurrer to the  
11 SECOND CAUSE OF ACTION without leave to amend; and
- 12 3. The Court SUSTAINS Defendant County of San Mateo's Demurrer to the THIRD  
13 CAUSE OF ACTION without leave to amend.

14 IT IS SO ORDERED.

15  
16 Dated: January \_\_, 2008

17  
18 \_\_\_\_\_  
19 HONORABLE  
20 JUDGE OF THE SUPERIOR COURT

21  
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28

MICHAEL P. MURPHY, COUNTY COUNSEL (SBN 83887)  
By: John D. Nibbelin, Deputy (SBN 184603)  
By: Rebecca M. Archer, Deputy (SBN 202743)  
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Facsimile: (650) 363-4034

ENDORSED FILED  
SAN MATEO COUNTY

DEC 8 8 2007

Clk of the Superior Court  
By: E. MURPHY  
Deputy Clerk

Attorneys for Defendants  
COUNTY OF SAN MATEO, ROBERT  
FOUCAULT, individually and as Coroner, SAN  
MATEO COUNTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON

Plaintiff,

vs.

COUNTY OF SAN MATEO, ROBERT  
FOUCAULT, individual and as Coroner, SAN  
MATEO COUNTY

Defendants.

Case No. 467161

NON-CALIFORNIA CASES CITED IN  
SUPPORT OF DEFENDANTS COUNTY OF  
SAN MATEO AND ROBERT  
FOUCAULT'S DEMURRER TO  
COMPLAINT OF ISOLINA PICON

Hearing:

Date: January 29<sup>th</sup>, 2008  
Time: 9:00 a.m.  
Dept: Law and Motion

Case No. 467161

NON-CALIFORNIA CASES CITED IN SUPPORT OF DEFENDANTS COUNTY OF SAN MATEO AND  
ROBERT FOUCAULT'S DEMURRER TO COMPLAINT OF ISOLINA PICON

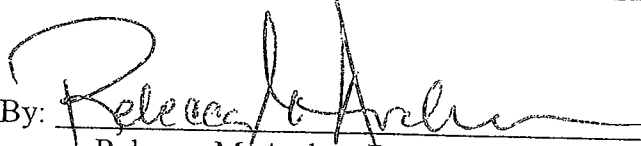
1 Pursuant to California Rule of Court 3.1113(j), Defendants, the County of San Mateo and Robert  
2 Foucrault, hereby lodge the following non-California authorities:

- 3 1. Attached hereto as Exhibit A is a true and correct copy of *Sabow v. United States* (9<sup>th</sup> Cir.  
4 1996) 93 F.3d 1445.

5 Dated: December 28, 2007

Respectfully submitted,

MICHAEL P. MURPHY, COUNTY COUNSEL

By:   
Rebecca M. Archer, Deputy

Attorneys for Defendants  
COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

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93 F.3d 1445

93 F.3d 1445, 96 Cal. Daily Op. Serv. 6409, 96 Daily Journal D.A.R. 10,547, 96 Daily Journal D.A.R. 11,799  
(Cite as: 93 F.3d 1445)

Page 1

▷

Sabow v. U.S.  
C.A.9 (Cal.), 1996.United States Court of Appeals, Ninth Circuit.  
Sara Townsend SABOW; Thomas F. Sabow; Vera Sabow; David N. Sabow; Dierdre Sabow; John David Sabow, Plaintiffs-Appellants,

v.

UNITED STATES of America, Defendant-Appellee.  
No. 94-56634.

Argued and Submitted April 8, 1996.

Decided Aug. 28, 1996.

As Amended Sept. 26, 1996.

Family of Marine Corps officer who died of gunshot wound while under investigation for alleged misuse of military aircraft brought action under the Federal Tort Claims Act (FTCA) seeking damages under tort theories of negligent infliction of emotional distress, intentional infliction of emotional distress, negligent handling of human remains, and personal injury. The United States District Court for the Central District of California, Alicemarie H. Stotler, J., dismissed claims for lack of subject-matter jurisdiction and failure to state a claim, and plaintiffs appealed. The Court of Appeals, Michael Daly Hawkins, Circuit Judge, held that: (1) discretionary function exception of the FTCA precluded negligent infliction of emotional distress claims based on conduct of investigators from the Naval Investigative Service (NIS) and the Office of the Judge Advocate General (JAG) during course of investigation into death of decedent; (2) discretionary function exception did not bar claims of negligent infliction of emotional distress based on conduct of Marine Corps general and other military personnel during course of five-hour meeting with family, and thereafter; (3) plaintiffs stated claim under California law for intentional infliction of emotional distress based on conduct of general; (4) intentional torts exception to the FTCA did not bar intentional infliction of emotional distress claims, as they did not arise of enumerated tort of defamation; and (5) military had no duty of care under California law to treat decedent's remains in a certain manner during investigation.

Affirmed in part, reversed in part, and remanded.  
West Headnotes**[1] Federal Courts 170B 776****170B Federal Courts****170BVIII Courts of Appeals****170BVIII(K) Scope, Standards, and Extent****170BVIII(K)1 In General****170Bk776 k. Trial De Novo. Most Cited****Cases**

Dismissal for failure to state a claim is reviewed de novo, and review is limited to contents of complaint.

**[2] Federal Civil Procedure 170A 1829****170A Federal Civil Procedure****170AXI Dismissal****170AXI(B) Involuntary Dismissal****170AXI(B)5 Proceedings****170Ak1827 Determination****170Ak1829 k. Construction of Pleadings. Most Cited Cases****Federal Civil Procedure 170A 1835****170A Federal Civil Procedure****170AXI Dismissal****170AXI(B) Involuntary Dismissal****170AXI(B)5 Proceedings****170Ak1827 Determination****170Ak1835 k. Matters Deemed Admitted. Most Cited Cases**

On motion to dismiss for failure to state a claim, all allegations of material fact are taken as true and construed in light most favorable to nonmoving party.

**[3] Federal Civil Procedure 170A 1773****170A Federal Civil Procedure****170AXI Dismissal****170AXI(B) Involuntary Dismissal****170AXI(B)3 Pleading, Defects In, in General****170Ak1773 k. Clear or Certain Nature of Insufficiency. Most Cited Cases**

Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his or her claim which would entitle plaintiff to relief.

**[4] Federal Courts 170B 776**

93 F.3d 1445

93 F.3d 1445, 96 Cal. Daily Op. Serv. 6409, 96 Daily Journal D.A.R. 10,547, 96 Daily Journal D.A.R. 11,799  
(Cite as: 93 F.3d 1445)

170B Federal Courts170BVIII Courts of Appeals170BVIII(K) Scope, Standards, and Extent170BVIII(K)1 In General170Bk776 k. Trial De Novo. Most CitedCases

Existence of subject-matter jurisdiction is question of law reviewed de novo.

[5] Federal Courts 170B 870.1170B Federal Courts170BVIII Courts of Appeals170BVIII(K) Scope, Standards, and Extent170BVIII(K)5 Questions of Fact, Verdicts and Findings170Bk870 Particular Issues and Questions170Bk870.1 k. In General. MostCited Cases

District court's factual findings on all jurisdictional issues must be accepted unless clearly erroneous.

[6] United States 393 78(12)393 United States393V Liabilities393k78 Torts393k78(12) k. Execution of Statutes or Regulations; Discretionary Acts or Functions. Most Cited Cases

Where discretionary function exception to the Federal Tort Claims Act (FTCA) applies, no federal subject-matter jurisdiction exists. 28 U.S.C.A. § 2680(a).

[7] United States 393 141(3)393 United States393IX Actions393k141 Evidence393k141(1) Presumptions and Burden of Proof393k141(3) k. Torts. Most Cited Cases

While plaintiffs bears initial burden of proving subject-matter jurisdiction under the Federal Tort Claims Act (FTCA), the United States bears ultimate burden of proving applicability of discretionary function exception. 28 U.S.C.A. § 2680(a).

[8] United States 393 78(12)393 United States393V Liabilities393k78 Torts393k78(12) k. Execution of Statutes or Regulations; Discretionary Acts or Functions. Most Cited Cases

Court of Appeals uses two-step analysis to determine whether challenged conduct falls under discretionary function exception of the Federal Tort Claims Act (FTCA); Court first asks whether challenged actions involve an element of judgment or choice; if challenged actions involve an element of choice or judgment, Court must then determine whether judgment is one of the kind that the discretionary function exception was designed to shield, i.e., if judgment involves considerations of social, economic, or political policy, the exception applies. 28 U.S.C.A. § 2680(a).

[9] United States 393 78(12)393 United States393V Liabilities393k78 Torts393k78(12) k. Execution of Statutes or Regulations; Discretionary Acts or Functions. Most Cited Cases

"Discretionary act" requirement of the discretionary function exception the Federal Tort Claims Act (FTCA) is not satisfied if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow; in such event, employee has no rightful option but to adhere to the directive. 28 U.S.C.A. § 2680(a).

[10] United States 393 78(12)393 United States393V Liabilities393k78 Torts393k78(12) k. Execution of Statutes or Regulations; Discretionary Acts or Functions. Most Cited Cases

Discretionary function exception to the Federal Tort Claims Act (FTCA) barred negligent infliction of emotional distress claims arising from actions of investigators of the Naval Investigative Service (NIS) and the Office of the Judge Advocate General (JAG) during course of their investigation of shooting death of Marine Corps officer; investigators were not required to follow specific investigative regulations and directives detailed in investigative manual, and thus they were performing discretionary acts; moreover, discretionary judgments by investigators involved social, economic or political considerations. 28 U.S.C.A. § 2680(a).

**[11] United States 393 78(12)****393 United States****393V Liabilities****393k78 Torts**

**393k78(12)** k. Execution of Statutes or Regulations; Discretionary Acts or Functions. Most Cited Cases

Discretionary function exception of the Federal Tort Claims Act (FTCA) did not bar negligent infliction of emotional distress claims arising from decision of Marine Corps general to berate members of family of deceased Marine Corps officer whose shooting death was under investigation and from general's threat to "go after" medical license of decedent's brother who questioned investigators' conclusion that death was suicide; general had no legitimate policy rationale for resorting to verbal abuse and for threatening brother's medical license as response to possibility that family's complaints about investigation might be publicly aired. 28 U.S.C.A. § 2680(a).

**[12] Damages 115 57.21****115 Damages****115III Grounds and Subjects of Compensatory Damages****115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses****115III(A)2 Mental Suffering and Emotional Distress****115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage****115k57.21 k. Elements in General.****Most Cited Cases**

(Formerly 115k50.10)

Under California law, elements of intentional infliction of emotional distress are: extreme and outrageous conduct by defendant with intention of causing, or reckless disregard of the probability of causing, emotional distress; plaintiff's suffering severe or extreme emotional distress; and actual and proximate causation of emotional distress by defendant's outrageous conduct.

**[13] Damages 115 57.22****115 Damages****115III Grounds and Subjects of Compensatory Damages****115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses****115III(A)2 Mental Suffering and Emotional****Distress****115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage****115k57.22 k. Nature of Conduct.****Most Cited Cases**

(Formerly 115k50.10)

To satisfy element of intentional infliction of emotional distress under California law, conduct of defendant must not only be intentional and outrageous, but must also be directed at plaintiff, or occur in presence of plaintiff of whom defendant is aware.

**[14] Damages 115 57.25(2)****115 Damages****115III Grounds and Subjects of Compensatory Damages****115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses****115III(A)2 Mental Suffering and Emotional Distress****115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage****115k57.25 Particular Cases****115k57.25(2) k. Government; Criminal Justice. Most Cited Cases**

(Formerly 115k50.10)

Widow of Marine Corps officer found dead of gunshot wound failed to state a claim under California law for intentional infliction of emotional distress based on alleged failure of military to properly investigate husband's death, military's handling of decedent's remains, and investigators' questioning of widow shortly after she discovered her husband's body; neither alleged failure to follow investigative guidelines nor alleged negligent handling of remains was conduct directed at widow or that occurred in presence of widow; moreover, questioning of widow on morning she found body was not so "extreme and outrageous" as to be actionable.

**[15] Damages 115 57.25(2)****115 Damages****115III Grounds and Subjects of Compensatory Damages****115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses****115III(A)2 Mental Suffering and Emotional Distress****115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage**

115k57.25 Particular Cases115k57.25(2) k. Government;Criminal Justice. Most Cited Cases

(Formerly 115k50.10)

Family of Marine Corps officer who died of gunshot wound while under investigation for alleged misuse of military aircraft stated claim under California law for intentional infliction of emotional distress based on conduct of Marine Corps general during meeting with family six weeks after officer's death; complaint alleged that general continually and repeatedly stated that officer had killed himself due to serious allegations of misconduct against him, and that officer was a "crook" and a "felon," and complaint further alleged that general "became furious and began screaming at" family members in response to questions regarding investigation; alleged conduct was particularly outrageous as it allegedly was designed to prevent family from "going public" with their concerns about investigation.

[16] Damages 115 78(9)115 Damages115III Grounds and Subjects of Compensatory Damages115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses115III(A)2 Mental Suffering and Emotional Distress115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage115k57.25 Particular Cases115k57.25(2) k. Government;Criminal Justice. Most Cited Cases

(Formerly 115k50.10)

Family of Marine Corps officer who died of gunshot wound stated a claim for intentional infliction of emotional distress under California law based on conduct of Marine Corps general in relation to decedent's brother, a doctor who questioned conclusion of investigators that death was a suicide; complaint alleged that general instructed Marine Corps personnel to investigate ways in which brother's medical license could be attacked; alleged use of illegitimate means to fulfill impermissible ends of silencing criticism of military's investigation supported claim.

[17] United States 393 78(5.1)393 United States393V Liabilities393k78 Torts393k78(5) Nature of Act or Claim393k78(5.1) k. In General. Most Cited Cases

In determining whether a claim "arises out of" one of enumerated torts in the intentional torts exception of the Federal Tort Claims Act (FTCA), Court of Appeals looks beyond plaintiff's classification of cause of action to examine whether conduct upon which the claim is based constitutes one of the torts listed in statute. 28 U.S.C.A. § 2680(h).

[18] United States 393 78(9)393 United States393V Liabilities393k78 Torts393k78(5) Nature of Act or Claim393k78(9) k. Personal Injuries in General. Most Cited Cases

Intentional tort exception of the Federal Tort Claims Act (FTCA) did not bar intentional infliction of emotional distress claim brought by family of Marine Corps officer who died of gunshot wound while under investigation for alleged misuse of military aircraft, based on pattern of conduct of general and other military personnel during meeting with family, as alleged conduct did not "arise out of" enumerated tort of defamation; although general stated during meeting that decedent was a "crook" and a "felon," complaint concerned allegedly abusive delivery of statements, rather than their "defamatory" nature; rather, complaint was based on pattern of conduct of military personnel during meeting, which included denying family members opportunity to take a break during five-hour meeting, subjecting them to intense verbal abuse during meeting, and threatening to destroy decedent's reputation if family exercised their right to speak publicly about their concerns. 28 U.S.C.A. § 2680(h).

[19] United States 393 78(9)393 United States393V Liabilities393k78 Torts393k78(5) Nature of Act or Claim393k78(9) k. Personal Injuries in General. Most Cited Cases

Intentional torts exception to the Federal Tort Claims Act (FTCA) did not bar intentional infliction of emotional distress claim which was based on allegations that Marine Corps general attempted to impugn integrity of medical doctor who questioned conclusions of military investigators that death of his

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brother, a Marine Corps officer, was a suicide; general initiated investigation into status of doctor's medical license, and drafted letter, which was never sent but whose existence was made known to doctor, to state board of medical examiners accusing doctor of criminal and unethical misconduct; claim did not arise out of enumerated tort of defamation, as focus of complaint was not "defamatory" content of letter but behavior of general who attempted to impugn doctor's integrity. 28 U.S.C.A. § 2680(h).

## [20] Dead Bodies 116

### 116 Dead Bodies

116k9 k. Civil Liabilities for Illegal Acts. Most Cited Cases

Military investigators investigating shooting death of Marine Corps officer had no duty under California law to treat decedent's remains in a certain manner during investigation, precluding claim for negligent handling of remains based on allegation that body was left in the sun for seven hours.

\*1448 Daniel P. Sheehan, (argued), Carpinteria, California; Jaime D. Banfield, (on the briefs), Copenbarger & Associates, Santa Ana, California, for plaintiffs-appellants.

Mary L. Perry, Assistant United States Attorney, Los Angeles, California, for defendant-appellee.

Appeal from the United States District Court, for the Central District of California, Alicemarie H. Stotler, District Judge, Presiding. D.C. No. CV-93-00991-AHS.

Before: GOODWIN and HAWKINS, Circuit Judges, and MARQUEZ, <sup>FN\*</sup> District Judge.

FN\* The Honorable Alfredo C. Marquez, Senior United States District Judge for the District of Arizona, sitting by designation.

MICHAEL DALY HAWKINS, Circuit Judge:

Appellants appeal the district court's decision to dismiss their Federal Tort Claims Act ("FTCA") claims for lack of subject matter jurisdiction and failure to state a claim. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part and reverse in part.

## I. FACTS

This appeal arises out of the unfortunate death of

decorated Marine Corps Colonel James E. Sabow and the subsequent investigation of that death by military authorities. \*1449 Because the case comes to us after its dismissal for lack of subject matter jurisdiction and for failure to state a claim, we are required to assume that the facts alleged in the Complaint are true and it is from that source that we draw the following tangled web.

In early 1991, the Office of the Inspector General of the Marine Corps ("IGMC") was in the midst of an investigation into alleged misuse of military aircraft by high-ranking Marine Corps officers at the Marine Corps Air Station in El Toro, California ("MCAS-El Toro"). First brought to the attention of Department of Defense authorities by an anonymous tip, the investigation centered around the personal use of military aircraft. Colonel Joseph Underwood, Chief of Staff for Marine aircraft operations in the Western United States and Colonel Sabow's immediate supervisor, was an early casualty of the investigation, having been relieved of his duties on approximately January 12, 1991. On January 14, Colonel Sabow was named to replace Colonel Underwood as Chief of Staff on an acting basis.

The next day the investigative net apparently widened to include Colonel Sabow, who was informed that he was a possible target of the investigation into the use of Marine Corps aircraft at MCAS-El Toro. No formal charges had been levied against Colonel Sabow and the allegations involving him, even if true, did not appear to be career-threatening. <sup>FN1</sup>

FN1. The investigation of Colonel Sabow apparently centered on his alleged use of military aircraft to transport some personal items (e.g. stereo equipment) to his son in another state. None of the similar charges against other officers, arising out of the same investigation, had resulted in criminal charges of any kind.

At about 9:30 AM on January 22, 1991, Mrs. Sarah Sabow found the body of her husband Colonel Sabow in the back yard of the family quarters at MCAS-El Toro. Colonel Sabow had sustained a massive shotgun blast to the head.

Mrs. Sabow immediately ran next door to the quarters of Colonel Underwood to report her gruesome discovery. Colonel Underwood immediately made a telephone call to General Wayne

T. Adams ("General Adams"). General Adams was the Commanding General of MCAS-El Toro and the senior person in the chain of command over base air operations that included both Colonel Sabow and Colonel Underwood.

After being alerted to Colonel Sabow's death by Colonel Underwood, General Adams called the Provost Marshal (base military police), who went to the Sabow quarters and began an investigation into the circumstances of Colonel Sabow's death. Naval Investigative Service ("NIS") agents soon arrived on the scene and took over the investigation. Thereupon began the first of three investigations, each of which the Sabows allege were unprofessional, ineffective, and blindly insensitive to the concerns of the Sabow family.<sup>FN2</sup> All three investigations—one conducted by the NIS and two conducted by the Office of the Judge Advocate General ("JAG")—concluded that Colonel Sabow committed suicide.<sup>FN3</sup>

<sup>FN2</sup>. The Complaint alleged, *inter alia*, that the crime scene was not secured, important evidence was moved and manipulated before pictures of the scene were taken, no effort was made to securely handle critical evidence—including the shotgun found at the scene (on which, curiously, no prints of Colonel Sabow were ever found)—and that Mrs. Sabow was subjected to a withering investigative interview without benefit of any support or assistance. In addition, the body of Colonel Sabow was left in the sun for more than seven hours.

<sup>FN3</sup>. The NIS completed its report on the death of Colonel Sabow on August 27, 1991. On January 23, 1991, the Commander's Office of the Marine Corps Air Bases Western Area instructed JAG to begin its own investigation into Colonel Sabow's death. That investigation was completed on February 7, 1991. On December 10, 1991, a second JAG investigation was initiated, and on December 13, 1991 that investigation was closed.

Soon after the first investigation began, Colonel Sabow's brother John David Sabow \*1450 ("Dr. Sabow") arrived to assist his sister-in-law. A board-certified neurosurgeon in South Dakota, Dr. Sabow soon began to believe that his brother had not

committed suicide, but rather may have been the victim of foul play. Dr. Sabow pressed military authorities, including General Adams, for answers to questions about the facts and circumstances surrounding his brother's death.<sup>FN4</sup>

<sup>FN4</sup>. He questioned, for example, the presence of large amounts of blood in Colonel Sabow's lungs—a fact physically incompatible, according to his medical training, with a single self-inflicted wound to the face severing the brain stem.

Dissatisfied with the responses he was receiving, Dr. Sabow threatened to "go public" with his concerns. This was immediately brought to the attention of General Adams, who attempted to diffuse the situation by proposing a meeting with the family and responsible investigative officials. The meeting, General Adams promised, would "clear the air" about the investigation.

Unbeknownst to the Sabow family, General Adams actually planned to convince them that "going public" would only mean the release of terribly damaging information about Colonel Sabow's alleged activities prior to his death. The meeting took place on March 9, 1991 in General Adams' office at MCAS-El Toro. Lasting nearly five hours, during which time neither Mrs. Sabow nor Dr. Sabow were offered a recess or refreshments, General Adams allegedly went on a verbal tirade. Ignoring that Colonel Sabow had not even been formally accused, let alone convicted, of any criminal offense, General Adams is alleged to have continually referred to him as a "crook" and a "felon."

Sometime after the meeting, General Adams learned that Dr. Sabow had apparently made an inquiry at MCAS-Yuma, Arizona about Adams' own medical records. In response, General Adams allegedly ordered military officials under his command to advise him how he could "go after" Dr. Sabow's medical license. The Sabows allege that the General planned to draft a letter to South Dakota medical licensing authorities making the strongest complaint that could be mustered against Dr. Sabow, confront him, and threaten to send it unless Dr. Sabow ceased all questioning of the investigation into Colonel Sabow's death and left the El Toro area. Although the letter was never sent, General Adams allegedly allowed a copy of it to "fall into Dr. Sabow's hands."

In June 1994, Sarah Sabow, Dr. Sabow and other

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members of the family brought this action under the FTCA seeking damages under the tort theories of negligent infliction of emotional distress, intentional infliction of emotional distress, negligent handling of human remains, and personal injury. The district court dismissed the Sabows' action in its entirety for lack of subject matter jurisdiction and for failure to state a claim. For the reasons set forth below, we affirm the dismissal of those claims generally based on the conduct of the investigation into the death of Colonel Sabow, but reverse as to those that have as their nexus the actions of General Adams, including his statements at the March 9 meeting and his actions and statements directed toward Dr. Sabow.

## II. STANDARDS OF REVIEW

[1][2][3] A dismissal for failure to state a claim is reviewed de novo. Stone v. Travelers Corp., 58 F.3d 434, 436-37 (9th Cir.1995). Review is limited to the contents of the complaint. Argabright v. United States, 35 F.3d 472, 474 (9th Cir.1994). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. National Wildlife Federation v. Espy, 45 F.3d 1337, 1340 (9th Cir.1995). A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his or her claim which would entitle plaintiff to relief. Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir.1995).

[4][5] The existence of subject matter jurisdiction is a question of law reviewed de novo. Valdez v. United States, 56 F.3d 1177, 1179 (9th Cir.1995). The district court's factual findings on all jurisdictional issues must be accepted unless clearly erroneous. Nike, Inc. v. Comercial Iberica de Exclusivas, 20 F.3d 987, 990 (9th Cir.1994).

## \*1451 III. DISCUSSION

The district court dismissed each of the Sabows' claims on one of two grounds. The court dismissed most of the Sabows' claims for lack of subject matter jurisdiction pursuant to the discretionary function and intentional torts exceptions to the FTCA. See 28 U.S.C. § 2680(b) (discretionary function exception); 28 U.S.C. § 2680(h) (intentional torts exception). As to those claims to which the court determined no FTCA exception applied, the court held that the Sabows had failed to state a claim under California tort law and dismissed those claims pursuant to §

1346(b) of the FTCA. See 28 U.S.C. § 1346(b) (requiring that FTCA claim comprise a cause of action "in accordance with the law of the place where the act or omission occurred"). We turn to an examination of whether the Sabows established subject matter jurisdiction and an actionable cause under California tort law as to each of the four claims alleged in their complaint.

### A. NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS <sup>FN5</sup>

<sup>FN5</sup>. Whether the Sabows' complaint states a claim for negligent infliction of emotional distress is not at issue on appeal, and thus is not discussed below.

#### 1. The NIS and JAG Investigations

#### Does The FTCA's Discretionary Function Exception Strip The District Court of Subject Matter Jurisdiction Over The Sabows' Negligent Infliction Claim?

##### Statutory Framework and Legal Standards

[6][7] The FTCA is a waiver of sovereign immunity, limited in part by the discretionary function exception. The discretionary function exception covers any FTCA claims "based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Where the discretionary function exception to the FTCA applies, no federal subject matter jurisdiction exists. In re Glacier Bay, 71 F.3d 1447, 1450 (9th Cir.1995). While plaintiff bears the initial burden of proving subject matter jurisdiction under the FTCA, "... the United States bears the ultimate burden of proving the applicability of the discretionary function exception...." Prescott v. United States, 973 F.2d 696, 702 (9th Cir.1992).

[8][9] We use a two-step analysis to determine whether challenged conduct falls under the discretionary function exception. First, we ask whether the challenged actions involve "an element of judgment or choice." United States v. Gaubert, 499 U.S. 315, 322, 111 S.Ct. 1267, 1273, 113 L.Ed.2d 335 (1991) (quotation omitted). This

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"discretionary act" requirement is not satisfied if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." Berkovitz v. United States, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958-59, 100 L.Ed.2d 531 (1988). If the challenged actions involve an element of choice or judgment, we then must determine "whether that judgment is of the kind that the discretionary function exception was designed to shield." Gaubert, 499 U.S. at 322-23, 111 S.Ct. at 1273-74. More specifically, "if the judgment involves considerations of social, economic, or political policy, the exception applies." In re Glacier Bay, 71 F.3d at 1450. Both the discretionary act prong and the policy judgment prong of the discretionary function exception must be satisfied before the exception will apply.

#### Analysis

#### Were The Investigative Acts Of The NIS And JAG Discretionary Acts?

The Sabows argue that the NIS and JAG officers investigating Colonel Sabow's death were required to follow specific investigative regulations and directives detailed in both the NIS investigative manual and the JAG investigative manual. Accordingly, the Sabows conclude that the discretionary act prong is not satisfied as to any action (or inaction) that did not conform to procedures set out in the NIS or JAG investigative manuals. The government argues that because the NIS and JAG manuals only provide general guidelines for investigative activity<sup>1452</sup> while leaving significant discretion to the field agents to conduct an investigation, the discretionary act prong is satisfied. We review the relevant provisions of the NIS and JAG manuals separately to determine whether the investigators were performing discretionary acts.

#### NIS Investigation

[10] The NIS manual sections cited by the Sabows did not require a specific course of action.<sup>FN6</sup> Rather, the NIS manual in general and the sections cited by the Sabows in particular are meant to comprise a set of investigative guidelines to be followed at the discretion of the investigating officer(s). The manual consistently notes that the NIS' guidelines, while

generally applicable to most investigations, should only be followed when appropriate to the specific "crime scene" under investigation. Typical are the manual's prefaces to the lists of measures normally appropriate to the "Collection and Preservation of Physical Evidence," see NIS Manual § 1202(2) ("Obviously, there is no definite rule or set of rules that can be applied to defining the dimensions of the scene of a crime."), "Searching The Crime Scene," see NIS Manual § 1203(1) ("While the circumstances of a particular case will naturally govern the actions taken to protect and preserve the physical evidence, the following are considered generally valid guides."), and "Death Investigations," see NIS Manual § 3001(1) ("This chapter provides policy and guidance for NIS personnel engaged in the investigation of deaths which occur under other than natural circumstances."). Clearly, the guidelines promulgated by the NIS in its investigative manual were meant to be followed at the discretion of NIS investigating officers in light of the specific circumstances surrounding a particular investigation. See generally Pooler v. United States, 787 F.2d 868, 871 (3d Cir.), cert. denied, 479 U.S. 849, 107 S.Ct. 175, 93 L.Ed.2d 111 (1986) ("Decision making as to investigation and enforcement, particularly when there are different types of enforcement action available, are discretionary judgments." (quoting Bernitsky v. United States, 620 F.2d 948, 955 (3d Cir.1980), cert. denied, 449 U.S. 870, 101 S.Ct. 208, 66 L.Ed.2d 90 (1980))); Hobdy v. United States, 762 F.Supp. 1459, 1461 (D.Kan.1991), aff'd, 968 F.2d 20 (10th Cir.1992) ("[T]he decision how to investigate, who to investigate, and how to present evidence to the proper authorities are classic examples of discretionary conduct." (internal quotations and citation omitted)).

<sup>FN6</sup> The Sabows allege in their first amended complaint that the NIS was responsible for at least twenty violations of mandatory directives found in nine sections of the NIS manual. The Sabows specifically alleged that each of the following investigative actions and/or inactions violated a mandatory NIS directive: multiple failures to preserve physical evidence, mishandling of physical evidence, alteration of the physical evidence prior to taking photographs, failure to get fingernail scrapings and properly preserve other physical evidence relating to Colonel Sabow, failure to secure attendance of a Armed Forces Medical Examiner at the

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autopsy, improper questioning of Mrs. Sabow, failure to forward the autopsy report to the Armed Forces Institute of Pathology for review, exclusive reliance on interview summaries rather than sworn statements from witnesses, failure to resolve inconsistencies in witness statements, failure to consider all the evidence, failure to treat Colonel Sabow's death as a possible homicide, failure to seek assistance of mental health professional qualified in forensic science, concealment of loss and/or contamination of physical evidence.

More specifically, the individual directives cited by the Sabows do not prescribe courses of action that must be followed by NIS officers conducting an investigation.<sup>FN7</sup> With few exceptions, each of the NIS provisions cited by the Sabows are cast in suggestive ("should") rather than mandatory ("must") terms. See *In re Glacier Bay*, 71 F.3d at 1452 (noting that "should" is "suggestive, not mandatory"); compare *Valdez*, 56 F.3d at 1179 (holding that discretionary act prong satisfied where suggestive Park Service policy guidelines at issue); *Sutton v. Earles*, 26 F.3d 903, 908 (9th Cir.1994) (suggestive Corps of Engineers regulations), with *In re Glacier Bay*, 71 F.3d at 1451-52 (holding that discretionary act prong is not satisfied when mandatory provisions of Department of Commerce's\*1453 Hydrographic Manual and Cook Inlet Survey Project Instructions at issue); *Faber v. United States*, 56 F.3d 1122, 1126 (9th Cir.1995) (reviewing "three specific and mandatory" safety measures included in National Forest Service's safety regulations). Although several of the violations alleged by the Sabows correspond to guidelines in the NIS manual that are phrased in mandatory terms, see, e.g., NIS Manual § 1203(1)(g) (investigative agent assuming responsibility for scene "must" make all information available to "search leader"), NIS Manual § 3001 ("NIS shall initiate an investigation" into non-natural deaths), the presence of a few, isolated provisions cast in mandatory language does not transform an otherwise suggestive set of guidelines into binding agency regulations. See *Chamberlin v. Isen*, 779 F.2d 522, 525 (9th Cir.1985) (reviewing Manual of Patent Examining Procedures and concluding that while "[i]t is true that the MPEP contains some mandatory language[, f]or the most part, however, the MPEP only suggests or authorizes procedures for patent examiners to follow").

<sup>FN7</sup>. Examining each alleged NIS/JAG

guideline individually is in keeping with our observation that, in making the discretionary function determination, "the proper level of inquiry must be act by act." *In re Glacier Bay*, 71 F.3d at 1451 (citations omitted).

We find that the NIS investigative agents did not violate any mandatory NIS directives; rather, they exercised-callously, plaintiffs allege-the considerable discretion afforded to NIS agents assigned to collect evidence and conduct investigations.

#### *JAG Investigations*

The Sabows allege that the JAG's Office was responsible for at least ten violations of mandatory directives found in three sections of the JAG investigative manual.<sup>FN8</sup> Like the NIS manual, the JAG manual establishes suggestive guidelines and not mandatory investigative prescriptions. See *Blakey v. U.S.S. Iowa*, 991 F.2d 148, 153 (4th Cir.1993) ("The guidelines offer suggestions that officers may consider, but the JAG Manual does not mandate any given procedure for investigations."). None of the provisions cited by the Sabows are cast in mandatory terms, and the JAG manual makes clear that officers are entitled to discretion in conducting an investigation into a death of non-natural causes. Accordingly, we hold that the JAG investigators were performing discretionary acts, and thus that the discretionary act prong of the discretionary function exception is satisfied.

<sup>FN8</sup>. The Sabows specifically allege that each of the following actions and/or inactions during the JAG's first investigation of Colonel Sabow's death violated a mandatory JAG directive: conducting a JAG investigation before the NIS investigation had been completed, relying on NIS interviews and completing JAG investigation before the NIS had completed interviewing all the witnesses, failing to make an independent investigation of Colonel Sabow's death, and impermissibly including an opinion in the final report regarding whether Colonel Sabow was "acting in the line of duty."

The Sabows alleged that each of the following actions and/or inactions during the JAG's second investigation violated a mandatory JAG directive: allowing inadequate time to complete the

investigation, misquoting witness statements in the final report, failing to interview unbiased witnesses, relying exclusively on NIS witness statement summaries, failing to independently verify facts, and assuming Colonel Sabow had engaged in criminal conduct regarding the use of Marine Corps aircraft.

**Did The Investigative Actions Of The NIS And JAG Involve Considerations Of Social, Economic, Or Political Policy?**

The Sabows argue that even if the government satisfies the discretionary act prong of the discretionary function exception inquiry, the actions taken by the NIS and JAG investigative officers did not involve "considerations of social, economic, or political policy" and thus the government fails the second half of the two-part discretionary function test. Because the same analysis applies to both the actions of the NIS and the JAG, we treat them together. We find that the actions of the NIS and JAG investigators did involve considerations of social, economic, or political policy.

The investigation into Colonel Sabow's death involved the types of social and political judgments that Congress meant to shield from FTCA challenges. Investigations by federal law enforcement officials, particularly those involving the U.S. military, clearly require investigative officers to consider relevant political and social circumstances in making decisions about the nature and scope of a criminal investigation. See *\*1454 Flax v. United States*, 847 F.Supp. 1183, 1190-91 (D.N.J.1994) (holding that surveillance activity by FBI requires discretion and social, economic, and political judgments, so exception applies); see generally *Pooler v. United States*, 787 F.2d at 871 (holding that "Congress did not intend to provide for judicial review of the quality of investigative efforts"). In addition to the types of political and social considerations that would generally affect an investigation into the non-natural death of a Marine Corps Colonel, the investigation of Colonel Sabow's death was potentially influenced by a specific, highly political series of events: the Marine Corps' then-ongoing, and increasingly well-publicized,<sup>FN9</sup> investigation into abuses of Marine Corps flying privileges and resources by MCAS-EI Toro officers. Under these circumstances, it cannot be gainsaid that the investigations into Colonel Sabow's death were intertwined with political and social considerations.

<sup>FN9</sup> The morning of Colonel Sabow's death, the Orange County Register reported that Colonel Underwood, the chief of staff at the base at which Colonel Sabow was stationed, had been relieved of his duties and was under investigation for improper use of his position. See "Second in Command at El Toro Relieved of Duties," *The Orange County Register*, January 22, 1991 at B1.

Because we believe that the NIS' and JAG's discretionary judgments involved social, economic, or political considerations, we affirm the district court's discretionary function exception determination as it relates to claims arising out of the allegedly negligent failure to follow the investigative procedures set out in the NIS and JAG investigative manuals. Although some of the actions and inactions alleged by the Sabows, if true, represent alarming instances of poor judgment and a general disregard for sound investigative procedure, the investigative agents took discretionary action involving considerations of social and political policy. Accordingly, we affirm the district court's dismissal of the Sabows' negligent infliction of emotional distress claim as it relates to the NIS and JAG investigations.

**2. Conduct Of General Adams And Other Military Officials**

**The Discretionary Function Exception**

[11] The Sabows' negligent infliction claim, to the extent it is not based on the allegedly negligent investigative activity of NIS and JAG personnel, is not barred by the discretionary function exception. General Adams' decision (as alleged by the Sabows) to berate the Sabows at the March 1991 meeting and to investigate Dr. Sabow does not involve considerations of social, economic, or political policy of the type Congress intended to shield from FTCA actions. General Adams had no legitimate policy rationale for resorting to verbal abuse and an investigation of Dr. Sabow's medical license as a response to the possibility that complaints about the military's investigation into the Sabow death might be publicly aired. Thus, to the extent the Sabows' negligent infliction claim is based on those specific acts, the discretionary function exception does not apply.<sup>FN10</sup>

FN10. Because we find that the government has failed to satisfy the second part of the two-part discretionary function test, we do not address whether the government has satisfied the first part of the test.

## B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

### 1. Did The Sabows State An Actionable Cause Under California Law?

#### *Legal Standard*

[12][13] Under California law, the elements of intentional infliction of emotional distress are:

(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by defendant's outrageous conduct.

*Christensen v. Superior Court*, 54 Cal.3d 868, 2 Cal.Rptr.2d 79, 820 P.2d 181, 202 (1991) (in bank) (quotations and citations omitted). The conduct must not only be intentional and outrageous, but must also be "directed at \*1455 plaintiff, or occur in the presence of a plaintiff of whom defendant is aware." *Id.*

#### *Analysis*

[14] The Sabows contend that the NIS' and JAG's alleged failure to properly investigate Colonel Sabow's death, the military's handling of Colonel Sabow's remains, the NIS' questioning of Mrs. Sabow shortly after she had discovered her husband's body, General Adams' conduct during the March 9, 1991 meeting with Mrs. Sabow and Dr. Sabow, and General Adams' alleged investigation into ways in which Dr. Sabow's medical license could be revoked constitute extreme and outrageous conduct under California law and thus give rise to an actionable cause under § 1346(b) of the FTCA for intentional infliction of emotional distress. The district court disagreed as to the NIS and JAG investigations of Colonel Sabow's death and the handling of Colonel Sabow's remains and dismissed the Sabows' intentional infliction of emotional distress claim for

failure to state a claim insofar as it related to that conduct.

We affirm the district court's decision to dismiss the Sabows' intentional infliction of emotional distress claim as it related to NIS and JAG investigative decisions and the allegedly negligent handling of Colonel Sabow's remains. This includes any allegation relating to a failure to follow investigative guidelines, the negligent handling of Colonel Sabow's remains, and the military's questioning of Mrs. Sabow the morning she found her husband's body. Neither the alleged failure to follow investigative guidelines nor the alleged negligent handling of Colonel Sabow's remains was conduct "directed at the plaintiff[s], or [that] occur[ed] in the presence of plaintiff[s] of whom the defendant was aware." *Christensen*, 2 Cal.Rptr.2d 79, 820 P.2d at 202. FN11 And while the decision to question Mrs. Sabow on the morning she found her husband "did not constitute the defendant officers' finest hour," we do not believe the investigator's conduct was so "extreme and outrageous" as to be actionable under California law. *Cf. Davidson v. Westminster*, 32 Cal.3d 197, 185 Cal.Rptr. 252, 649 P.2d 894, 901 (1982) ("Conduct to be extreme and outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.").

FN11. Nor do the Sabows plead facts supporting a "reckless disregard" theory of liability in relation to the investigative procedures followed and the handling of Colonel Sabow's remains. California does not require a plaintiff to allege that the conduct was directed at plaintiff "when the defendant is aware of, but acts with reckless disregard of the plaintiff and the probability that his [or her] conduct will cause severe emotional distress to that plaintiff." *Christensen*, 2 Cal.Rptr.2d 79, 820 P.2d at 203-04. The Sabows do not allege facts giving rise to a claim of reckless disregard of the probability of causing severe emotional distress.

The district court did *not* dismiss the two remaining bases of the Sabows' intentional infliction claim (General Adams' conduct during the March 1991 meeting and his attempts to influence the status of Dr. Sabow's medical license) for failure to state an actionable cause under California law. FN12 The government asserts, however, that neither allegation describes extreme and outrageous conduct directed at

the Sabows and thus argues on appeal that the two remaining grounds for the Sabows' claim should also be dismissed for failure to state a claim. We disagree.

FN12. The district court did reject the other bases for the Sabows' claim, but did so on the basis of the intentional torts exception to the FTCA. The application of the intentional tort exception to the Sabows' intentional infliction claim is discussed below.

[15] The allegation that General Adams and others, at the March 1991 meeting held six weeks after Colonel Sabow's death, "continually, repeatedly, and adamantly stated th[at] Colonel Sabow had killed himself due to the serious allegations of misconduct against him, and that Colonel Sabow was a 'crook' and a 'felon' and had committed serious violations of the [Uniform Code of Military Justice]," coupled with the allegation that Adams "became furious and began screaming at Dr. Sabow and Mrs. Sabow" in response to Dr. Sabow's questions regarding the investigation, if true, describes "extreme and outrageous" conduct directed at plaintiffs and comprise a claim for intentional infliction under California law. Cf. Crain v. Krehbiel, 443 F.Supp. 202, 212-13 (N.D.Cal.1978)\*1456 (holding that DEA's verbally threatening and intimidating conduct toward plaintiff during conversations with plaintiff in course of investigation states a claim of extreme and outrageous conduct under California law). The alleged conduct is particularly outrageous given that it allegedly was designed to prevent the Sabows from "going public" with their concerns about the investigation.

[16] Similarly, General Adams' investigation into ways to have Dr. Sabow's medical license revoked, again allegedly coming in response to the Sabows' efforts to find out more about Colonel Sabow's death, also supports a cause for intentional infliction under California law. General Adams alleged use of illegitimate means (instructing Marine Corps personnel to investigate ways in which Dr. Sabow's medical license could be attacked) to fulfill impermissible ends (silence criticism and prevent further inquiries about the military's investigation) clearly supports a claim for intentional infliction.

Moreover, the outrageousness of General Adams' alleged conduct is magnified because the target of his attack was a constitutionally protected property

interest, namely Dr. Sabow's medical license. See Schwartz v. Board of Bar Examiners, 353 U.S. 232, 238-39, 77 S.Ct. 752, 755-56, 1 L.Ed.2d 796 (1957) (holding that a professional's license is a protected property interest); Suckow v. Board of Medical Examiners, 182 Cal. 247, 187 P. 965, 966 (1920) ("The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the Constitution and laws of the state, one is entitled to be protected and secured." (internal quotations omitted)).

In sum, the district court's dismissal of the part of the Sabows' intentional infliction claim based on the actions of the NIS and JAG investigators is affirmed. The Sabows successfully stated a claim, however, for intentional infliction of emotional distress based on the March 1991 meeting and the alleged attempt to investigate Dr. Sabow.

## 2. Does The Intentional Torts Exception Bar The Sabows' Claim? <sup>FN13</sup>

FN13. To the extent the Sabows' intentional infliction claim is based on the conduct of General Adams at the March 1991 meeting and his decision to target Dr. Sabow's license, the discretionary function exception does not apply. See *ante* at p. 1456.

### Statutory Framework and Legal Standards

[17] The intentional torts exception to the FTCA specifies that the Act's general waiver of sovereign immunity shall not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights...." 28 U.S.C. § 2680(h). In determining whether a claim "arises out of" one of the enumerated torts, we look beyond a plaintiff's classification of the cause of action to examine whether the conduct upon which the claim is based constitutes one of the torts listed in § 2680(h). See Mt. Homes, Inc. v. United States, 912 F.2d 352, 356 (9th Cir.1990) ("[W]e look beyond [the complaint's] characterization [of the cause of action] to the conduct on which the claim is based."); Thomas-Lazear v. Federal Bureau of Investigation, 851 F.2d 1202, 1207 (9th Cir.1988) ("This circuit looks beyond the labels used to determine whether a proposed claim is barred [by the intentional torts exception]"). We focus our § 2680(h) inquiry on

whether conduct that constitutes an enumerated tort is "essential" to a plaintiff's claim. See, e.g. *Mt. Homes, Inc.*, 912 F.2d at 356 (holding that plaintiff's claim alleged conduct that falls within the excepted tort of misrepresentation because "the essential element of Mt. Homes' claim is that [the government] gave it inaccurate information"); *Thomas-Lazear*, 851 F.2d at 1207 ("Put another way, the Government's actions that constitute a claim for slander are essential to Thomas-Lazear's claim for negligent infliction of emotional distress.").

#### Analysis

The district court held that the Sabows' intentional infliction claim, insofar as it was based on the government's conduct during the March 1991 meeting and the investigation of Dr. Sabow, was barred by the intentional torts exception to the FTCA. The district court concluded that the Sabows' allegations\*1457 regarding General Adams' characterization of Colonel Sabow as a "crook" and a "felon" and General Adams' investigation into ways to challenge Dr. Sabow's medical license arose out of the tort of defamation, an excepted tort under § 2680(h). The Sabows argue that the district court erred in concluding that their intentional infliction claim was based on defamation. Because we agree with the Sabows, we hold the intentional torts exception does not apply to the Sabows' intentional infliction claim.

#### Conduct During The March 1991 Meeting

[18] The district court focused its intentional torts exception inquiry on General Adams' alleged characterization of Colonel Sabow as a "crook" and a "felon." The district court read the Sabows' complaint too narrowly.

The Sabows' intentional infliction claim does not arise out of the "defamation" of Colonel Sabow. Rather, the Sabows base their claim on the pattern of conduct of General Adams and other military personnel during the March 9th meeting. The conduct included denying the Sabows an opportunity to take a break and/or eat or drink during the five-hour meeting, subjecting the Sabows to intense verbal abuse during the meeting, threatening to destroy Colonel Sabow's public reputation if the Sabow family exercised their right to speak publicly about Colonel Sabow's death and the military's investigations, and lying about the quantity and

quality of the military's evidence of wrongdoing by Colonel Sabow.

Thus, the district court's focus on General Adams' references to Colonel Sabow as a "crook" and a "felon" was too narrow. As noted above, the Sabows' complaint alleges that the military engaged in a far more extensive pattern of extreme and outrageous conduct during the March 1991 meeting. Although the statements of General Adams may be an important (but certainly not essential) part of that pattern of conduct, their relevance to the Sabows' complaint is not related to whether they were "defamatory" in nature, but rather whether the content (whether "defamatory" or not) and allegedly abusive delivery of the statements was extreme and outrageous under the circumstances. Cf. *Gasho v. United States*, 39 F.3d 1420, 1432-36 (9th Cir.1994) (allowing emotional distress claims based on allegations of malicious behavior by government investigators and law enforcement personnel to go forward under the FTCA), cert. denied, 515 U.S. 1144, 115 S.Ct. 2582, 132 L.Ed.2d 831 (1995).

Accordingly, we hold that the Sabows' intentional infliction claim, to the extent it is based on the conduct of General Adams and others during the March 1991 meeting, is not barred by the intentional torts exception.

#### Investigation Into Dr. Sabow's Medical License

[19] The Sabows' intentional infliction claim is also based in part on allegations that General Adams initiated an investigation into the status of Dr. Sabow's medical license. The investigation allegedly included the drafting of a letter by General Adams, which was apparently never sent, to the South Dakota Board of Medical Examiners "accusing Dr. Sabow of criminal and unethical misconduct." The district court dismissed this aspect of the Sabows' intentional infliction claim after concluding that the conduct alleged arose out of the excepted tort of defamation.

The district court again read the Sabows' complaint too narrowly. The Sabows' intentional infliction claim does not arise out of the "defamatory" content of the letter, but rather focuses more generally on General Adams' decision to investigate Dr. Sabow, his use of military staff to "research" ways in which Dr. Sabow's license could be attacked, and the threat-symbolized most powerfully by the drafting of the letter-of impugning Dr. Sabow's integrity allegedly in

response to Dr. Sabow's efforts to find out more about his brother's death.

Accordingly, we reverse the district court's § 2680(h) determination as it relates to the investigation of Dr. Sabow by General Adams.

#### \*1458 C. NEGLIGENT HANDLING OF HUMAN REMAINS

[20] The district court dismissed the Sabows' claim for the negligent handling of Colonel Sabow's remains because the military had no duty of care under California law. We affirm.

The only case that could arguably give rise to a duty of care under California law for the handling of human remains is *Christensen v. Superior Court*, 54 Cal.3d 868, 2 Cal.Rptr.2d 79, 820 P.2d 181 (1991) (in bank). *Christensen* is readily distinguishable from the case at bar. Plaintiffs in *Christensen* had contracted with a mortuary and a crematorium, and sued after the remains of decedent were mistreated and mishandled by defendants. *Id.* 2 Cal.Rptr.2d at 84-94, 820 P.2d at 185-86. Not only is the handling of an individual's remains during an investigation into his death different from mortuary services, but, unlike the defendants in *Christensen*, the U.S. Navy was under no contractual obligation to treat decedent's remains in a certain manner during the investigation. *Id.* 2 Cal.Rptr.2d at 84-94, 820 P.2d at 186-95 (citing statutory and contractual provisions in support of decision to recognize duty under California law). Accordingly, we affirm the district court's dismissal of this claim.

#### D. PERSONAL INJURY

The district court's dismissal of the Sabows' personal injury claim, insofar as it relates to the March 1991 meeting and the investigation of Dr. Sabow, is reversed.<sup>FN14</sup> The district court provided no reason for dismissing the personal injury claim, and the Sabows should be permitted to pursue it on remand.

<sup>FN14</sup>. Consistent with the analysis above, the Sabows' personal injury claim is dismissed insofar as it relates to the NIS or JAG investigations.

#### IV. CONCLUSION

We affirm the district court's dismissal of the Sabows' negligent infliction of emotional distress, intentional infliction of emotional distress, and personal injury claims insofar as they relate to the NIS and JAG investigations. We affirm the dismissal of the Sabows' negligent handling of human remains claim in its entirety. We reverse the district court's dismissal of the Sabows' negligent infliction of emotional distress, intentional infliction of emotional distress, and personal injury claims based on the March 1991 meeting and the alleged investigation of Dr. Sabow.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each party to bear its own costs.

C.A.9 (Cal.), 1996.

Sabow v. U.S.

93 F.3d 1445, 96 Cal. Daily Op. Serv. 6409, 96 Daily Journal D.A.R. 10,547, 96 Daily Journal D.A.R. 11,799

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ENDORSED FILED  
SAN MATEO COUNTY

JAN - 3 2008

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MATEO COUNTY

Clerk of the Superior Court  
By UNA FINAU  
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

ISOLINA PICON

Case No. 467161

Plaintiffs,

PROOF OF SERVICE

vs.

COUNTY OF SAN MATEO, ROBERT  
FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

Defendants.

PROOF OF SERVICE

I do hereby declare that I am a citizen of the United States employed in the County of San Mateo, over 18 years old and that my business address is 400 County Center, Redwood City, California. I am not a party to the within action.

On January 3, 2008, I served the following document(s):

**ORDER GRANTING COUNTY OF SAN MATEO'S EX PARTE APPLICATION FOR EXTENSION OF TIME TO RESPOND TO COMPLAINT OF ISOLINA PICON**

on all other parties to this action by placing a true copy of said document(s) in a sealed envelope in the following manner:

☒ (BY U.S. MAIL) by placing a true copy of said document(s) in a sealed envelope(s) addressed as shown below for collection and mailing at Redwood City, California following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☐ (BY OVERNIGHT DELIVERY) by placing a true copy of said document(s) in a sealed envelope(s) addressed as shown below for collection and delivery by an overnight delivery carrier with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the following day by an overnight delivery carrier.

☐ (BY E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail address shown below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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☐ (BY PERSONAL SERVICE) I caused such envelope(s) to be hand-delivered to the addressee(s) shown below. A proof of service signed by the authorized courier will be filed forthwith.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ (FEDERAL) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

  
COLLEEN PASSMORE

Picon v. County of San Mateo et al., - CIV467161

NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE

Ayanna L. Jenkins-Toney  
225 Bush Street, 16<sup>th</sup> Floor  
San Francisco, CA 94104

ATTORNEY FOR PLAINTIFF:  
Isolina Picon

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5 Attorneys for Defendants  
6 COUNTY OF SAN MATEO and  
7 ROBERT FOUCRAULT, individually  
and as Coroner of SAN MATEO COUNTY

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8  
9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 IN AND FOR THE COUNTY OF SAN MATEO  
11

12 ISOLINA PICON,

13 Plaintiff,

14 vs.

15 COUNTY OF SAN MATEO, ROBERT  
16 FOUCRAULT, individual and as Coroner, SAN  
MATEO COUNTY

17 Defendants.  
18

Case No. 467161

**REPLY IN SUPPORT OF DEMURRER OF  
COUNTY OF SAN MATEO AND SAN  
MATEO COUNTY CORONER**

19 By her failure to submit any opposition to defendants' demurrer, plaintiff implicitly concedes that  
20 it should be sustained without leave to amend. Further, as set forth in defendants' opening memorandum  
21 in this matter, none of the allegations made in the complaint and papers submitted therewith, even if true,  
22 gives rise to a cause of action against the County of San Mateo or the County Coroner and, in light of  
23 controlling law, plaintiff cannot amend her complaint to state a cause of action and no leave to amend  
24 should be given in this case.

25 **I. PLAINTIFF CANNOT AMEND HER COMPLAINT TO STATE A CAUSE OF ACTION**  
26 **FOR DENIAL OF RIGHT TO CONTROL THE DISPOSITION OF HER SON'S**  
**REMAINS**

27 Plaintiff first cause of action asserts that defendants denied her the right to control the disposition  
28 of her son's remains but this allegation is completely belied by her acknowledgement that her son's body

Case No. 467161

REPLY IN SUPPORT OF DEMURRER OF COUNTY OF SAN MATEO AND SAN MATEO COUNTY  
CORONER

1 was returned to her for burial. Moreover, she has offered absolutely no authority for the proposition th  
 2 she was entitled to have the *entire* body returned to her intact for burial. Rather, the law is fully to the  
 3 contrary.

4 Specifically, the California Government Code specifically vests the Coroner with the *authority*  
 5 *and discretion* to “retain those tissues of the body removed at the time of autopsy that may, in his or her  
 6 opinion, be necessary or advisable to the inquiry into the case, or for the verification of his or her  
 7 findings,” and to retain such organs for purposes of training and research. Cal. Gov’t. Code §§  
 8 27491.4(a) and 27491.45(a)(1). Nothing in California law requires that the Coroner notify or secure the  
 9 consent of the decedent’s next-of-kin, nor does it place any time limit on the retention of such organs.

10 Because the Coroner acted fully within his authority under California law in retaining the  
 11 decedent’s heart and because the rest of his body was returned to plaintiff for disposition, plaintiff’s first  
 12 cause of action does not state a claim and plaintiff cannot possibly amend it to state one. Therefore,  
 13 defendants’ demurrer, as it relates to the first cause of action, should be sustained without leave to  
 14 amend.

15 **II. PLAINTIFF CANNOT AMEND HER COMPLAINT TO STATE A CAUSE OF ACTION**  
 16 **FOR BREACH OF A MANDATORY DUTY**

17 Plaintiff also alleges that the County and Coroner breached a mandatory duty owed to plaintiff  
 18 but she has failed to identify any such duty, notwithstanding the legal requirement that mandatory duties  
 19 be specifically pled in order to survive demurrer. *See Lehto v. City of Oxnard* (1985) 171 Cal. App. 3d  
 20 285, 292. As noted in defendants’ opening memorandum, plaintiff fails to identify any authority that  
 21 creates a mandatory duty on defendants’ part and plaintiff’s failure to oppose defendants’ demurrer  
 22 highlights the fact that she cannot do so in this case. Thus, because the complaint reveals no basis for  
 23 liability against defendants, and plaintiff has not taken the opportunity by, for example, opposing the  
 24 instant motion, to identify any other possible mandatory duties upon which liability could be based, the  
 25 Court should sustain the instant demurrer without leave to amend. *See Lawrence v. Bank of America*  
 26 (1985) 163 Cal. App. 3d 431, 436.

27 //

28 //

III. PLAINTIFF CANNOT AMEND HER COMPLAINT TO STATE A CLAIM FOR  
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Defendants' opening memorandum points out that, negligent infliction of emotional distress is not an independent tort, but rather, it is one possible form of damages flowing from the tort of negligence and it therefore involves the usual duty and causation issues. As discussed above and in prior filings, plaintiff has not identified nor can she identify any mandatory duty that defendants owe to her. Therefore, as to this cause of action, it follows that the instant demurrer should be sustained without leave to amend.

IV. PLAINTIFF CANNOT AMEND HER COMPLAINT TO STATE A CAUSE OF ACTION  
BECAUSE THE COUNTY AND CORONER ARE IMMUNE FROM LIABILITY

As discussed in defendants' opening memorandum without any rebuttal by plaintiff, the Coroner and the County are immune from any liability for retaining body parts under the facts presented in this case. The Coroner possesses discretion to remove and retain body parts without any requirement to notify or obtain the consent of next of kin and, pursuant to the Tort Claims Act, the Coroner is immune from liability for the manner in which he exercises this discretion. Cal. Gov't. Code § 820.2.

CONCLUSION

For the reasons set forth herein and in defendants' opening memorandum, the instant demurrer should be sustained without leave to amend.

Dated: January 23, 2008

Respectfully submitted,

MICHAEL P. MURPHY, COUNTY COUNSEL

By: 

John D. Nibbelin, Deputy

Attorneys for Defendants  
COUNTY OF SAN MATEO and  
ROBERT FOUCRAULT, individual  
and as Coroner of SAN MATEO COUNTY

PROOF OF SERVICE

Picon v. County of San Mateo et al., - CIV467161

I do hereby declare that I am a citizen of the United States employed in the County of San Mateo, over 18 years old and that my business address is 400 County Center, Redwood City, California. I am not a party to the within action.

On January 23, 2008, I served the following document(s):

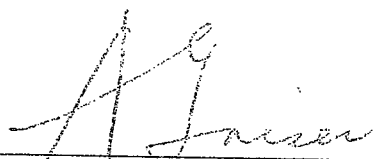
**REPLY IN SUPPORT OF DEMURRER OF COUNTY OF SAN MATEO AND  
SAN COUNTY CORONER**

on all other parties to this action by placing a true copy of said document(s) in a sealed envelope in the following manner:

☐ (BY U.S. MAIL) by placing a true copy of said document(s) in a sealed envelope(s) addressed as shown below for collection and mailing at Redwood City, California following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☒ (BY FACSIMILE TRANSMISSION) by telefaxing a true copy of said document(s) at \_\_\_\_\_, \_\_\_\_\_m. on the date stated above to the addressee(s) and number(s) shown below. A transmission report was properly issued by the transmitting facsimile machine and is attached hereto. The transmission was reported as completed and without error.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

  
ANNABELLE GAISER

**NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE**

Ayanna L. Jenkins-Toney  
225 Bush Street, 16<sup>th</sup> Floor  
San Francisco, CA 94104  
Fax No. (415) 464-4975

ATTORNEY FOR PLAINTIFF  
Isolina Picon

MODE = MEMORY TRANSMISSION

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-SMC COUNTY COUNSEL -

\*\*\*\*\* - \*\*\*\*\* - 650 363 4034- \*\*\*\*\*



## FAX TRANSMISSION

COUNTY OF SAN MATEO  
OFFICE OF THE COUNTY COUNSEL  
400 COUNTY CENTER, 6<sup>TH</sup> FLOOR  
REDWOOD CITY, CA 94063

DATE: January 23, 2008

TO: Ayanna L. Jenkins-Toney, Esq. FAX NUMBER: (415) 464-4975

FROM: JOHN D. NIBBELIN, Deputy PAGES incl. cover: 5  
Telephone: (650) 363-4757  
Facsimile: (650) 363-4034

RE: Picon v. County of San Mateo, et al.  
San Mateo County Superior Court Case No. 467161

### COMMENTS:

Handwritten notes and stamps are visible in the comments section, including "for ok" and "sent via mail 1/23/08".

### FAX OPERATOR:

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☐ Information about additional plaintiffs who are not competent adults is shown in Attachment 3.

SHORT TITLE: <b>PICON V. COUNTY OF SAN MATEO</b>	CASE NUMBER: <b>CIV 467161</b>
---	-----------------------------------

4. ☐ Plaintiff (*name*):  
     is doing business under the fictitious name (*specify*):  
  
     and has complied with the fictitious business name laws.
5. Each defendant named above is a natural person
- a. ☒ **except** defendant (*name*):  
     (1) ☐ a business organization, form unknown  
     (2) ☐ a corporation  
     (3) ☐ an unincorporated entity (*describe*):  
  
     (4) ☐ a public entity (*describe*):  
     (5) ☐ other (*specify*):
- c. ☐ **except** defendant (*name*):  
     (1) ☐ a business organization, form unknown  
     (2) ☐ a corporation  
     (3) ☐ an unincorporated entity (*describe*):  
  
     (4) ☐ a public entity (*describe*):  
     (5) ☐ other (*specify*):
- b. ☐ **except** defendant (*name*):  
     (1) ☐ a business organization, form unknown  
     (2) ☐ a corporation  
     (3) ☐ an unincorporated entity (*describe*):  
  
     (4) ☐ a public entity (*describe*):  
     (5) ☐ other (*specify*):
- d. ☐ **except** defendant (*name*):  
     (1) ☐ a business organization, form unknown  
     (2) ☐ a corporation  
     (3) ☐ an unincorporated entity (*describe*):  
  
     (4) ☐ a public entity (*describe*):  
     (5) ☐ other (*specify*):
- ☐ Information about additional defendants who are not natural persons is contained in Attachment 5.
6. The true names of defendants sued as Does are unknown to plaintiff.
- a. ☒ Doe defendants (*specify Doe numbers*): 1-100 were the agents or employees of other named defendants and acted within the scope of that agency or employment.
- b. ☒ Doe defendants (*specify Doe numbers*): 1-100 are persons whose capacities are unknown to plaintiff.
7. ☐ Defendants who are joined under Code of Civil Procedure section 382 are (*names*):
8. This court is the proper court because
- a. ☒ at least one defendant now resides in its jurisdictional area.
- b. ☒ the principal place of business of a defendant corporation or unincorporated association is in its jurisdictional area.
- c. ☒ injury to person or damage to personal property occurred in its jurisdictional area.
- d. ☐ other (*specify*):
9. ☒ Plaintiff is required to comply with a claims statute, and
- a. ☒ has complied with applicable claims statutes, or
- b. ☐ is excused from complying because (*specify*):

PLD-PI-001

SHORT TITLE:

CASE NUMBER:

PICON V. COUNTY OF SAN MATEO

CIV 467161

10. The following causes of action are attached and the statements above apply to each (*each complaint must have one or more causes of action attached*):

- a. ☐ Motor Vehicle
- b. ☐ General Negligence
- c. ☐ Intentional Tort
- d. ☐ Products Liability
- e. ☐ Premises Liability
- f. ☒ Other (*specify*):

1)BREACH OF THE RIGHT TO CONTROL THE DISPOSITION OF THE REMAINS OF A DECEASED PERSON; 2)BREACH OF A MANDATORY DUTY; 3)NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS; 4) 42 U.S.C.S. SECTION 1983

11. Plaintiff has suffered

- a. ☐ wage loss
- b. ☐ loss of use of property
- c. ☒ hospital and medical expenses
- d. ☒ general damage
- e. ☒ property damage
- f. ☐ loss of earning capacity
- g. ☒ other damage (*specify*):

CONTINUED SEVERE EMOTIONAL DISTRESS

12. ☐ The damages claimed for wrongful death and the relationships of plaintiff to the deceased are

- a. ☐ listed in Attachment 12.
- b. ☐ as follows:

13. The relief sought in this complaint is within the jurisdiction of this court.

14. **Plaintiff prays** for judgment for costs of suit; for such relief as is fair, just, and equitable; and for

- a. (1) ☒ compensatory damages
- (2) ☒ punitive damages

The amount of damages is (*in cases for personal injury or wrongful death, you must check (1)*):

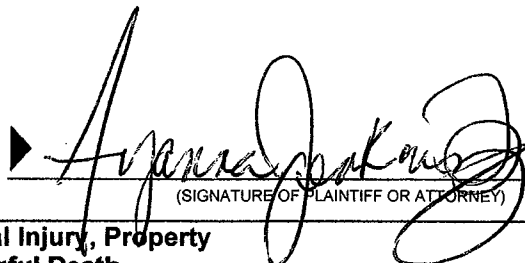
- (1) ☒ according to proof
- (2) ☐ in the amount of: \$

15. ☐ The paragraphs of this complaint alleged on information and belief are as follows (*specify paragraph numbers*):

Date: JANUARY 25, 2008

AYANNA L. JENKINS-TONEY, ESQ.

(TYPE OR PRINT NAME)

▶   
(SIGNATURE OF PLAINTIFF OR ATTORNEY)

SHORT TITLE:

CASE NUMBER:

— PICON V. COUNTY OF SAN MATEO

CIV 467161

## FIRST CAUSE OF ACTION

## DENIAL OF QUASI-PROPERTY RIGHT

## THE RIGHT TO CONTROL THE DISPOSITION OF THE REMAINS OF A DECEASED PERSON

Plaintiff Isolina Picon is the mother of Nicholas Picon, born October 6, 1983.

On October 25, 2006 Nicholas Picon died of natural causes.

On October 26, 2006 the Coroner's office of the County of San Mateo conducted an autopsy on the remains of Nicholas Picon. The Coroner's autopsy report is attached to this complaint as Exhibit A.

The autopsy report is attached as Exhibit A not for the truth asserted therein but for the limited purpose of establishing a timeline of events as it relates to the First, Second, Third and Fourth Causes Of Action. In the instant cause of action, the Denial Of A Quasi-Property Right to control the disposition of the remains of a deceased person is illustrated by the fact that the plaintiff was not informed that her son's heart was retained before burial. This fact is supported by Exhibit A which is stamped and signed with the date that the autopsy report was originally sent to the plaintiff, that date being November 27, 2006 (See Exhibit A – Pg. 1).

On October 26, 2006 an official or officials of the San Mateo County Coroner's office made the unilateral decision to retain the entire heart organ of the decedent Nicholas Picon without any attempt to notify his next of kin. The actions of the San Mateo County Coroner's office violated the 1987 version of the Uniform Anatomical Gift Act (UAGA), that was adopted by California authorizing the transfer of body parts when no knowledge of objection is known and after "a reasonable effort has been made to locate and inform next of kin of their option to make, or object to making, an anatomical gift." Cal. Health & Safety Code § 7151.5(a)(2).

On October 30, 2006 the plaintiff had a funeral for her son Nicholas Picon in order to bury and lay to rest what she thought at the time were his intact remains.

On November 13, 2006 the plaintiff learned for the first time that her son's heart was retained by the Coroner's office of the County of San Mateo.

The plaintiff was denied the right to bury her son's body intact at the time chosen by the decedent's family. When the coroner removed and retained the entire heart organ of the decedent and denied the plaintiff the right to possess, control, and dispose or prevent the violation of the remains of her deceased child, the coroner did not merely "take a single 'strand' from the 'bundle' of property rights:

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1 it chopped through the bundle, taking a slice of every strand." Loretto v. Teleprompter Manhattan CATV  
 2 Corp. (1982), 458 U.S. at 435. The denial of the plaintiffs right to bury her son's heart with his body was a  
 3 deprivation of the most certain way.  
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## SECOND CAUSE OF ACTION

## BREACH OF MANDATORY DUTY GOVERNMENT CODE § 815.6

On October 25, 2006 Nicholas Picon died in his home of natural causes. On October 26, 2006 the Coroner's office of the County of San Mateo conducted an autopsy on the remains of Nicholas Picon. On October 26, 2006 the Coroner's office of the County of San Mateo informed the plaintiff that her son died from a congenital heart defect known as Intramural tunneling of the coronary artery.

Before the original summons and complaint were filed in this action no one from the San Mateo County Coroner's office ever stated that additional inquiry or verification was needed to determine the cause of death. In fact the converse is true, one need only to look at Exhibit A - Pgs. 1 & 2.

On page one the cause of death is stated as being due to "Disease or Condition directly leading to death: A. Probable cardiac dysrhythmia due to B. Intramural tunneling or left anterior descending coronary artery", and on page two the time of the conclusion of the autopsy is shown as being "1000 hours, Thursday, October 26, 2006". Thus, if the standards set forth in California Government Code § 27491.4 are applied to the facts of this case a Breach of a Mandatory Duty has occurred.

California Government Code § 27491.4 provides in pertinent part:

(a) For purposes of inquiry the coroner shall, within 24 hours or as soon as feasible thereafter, where the suspected cause of death is sudden infant death syndrome and, in all other cases, the coroner may, in his or her discretion, take possession of the body, which shall include the authority to exhume the body, order it removed to a convenient place, and make or cause to be made a postmortem examination or autopsy thereon, and make or cause to be made an analysis of the stomach, stomach contents, blood, organs, fluids, or tissues of the body. The detailed medical findings resulting from an inspection of the body or autopsy by an examining physician shall be either reduced to writing or permanently preserved on recording discs or other similar recording media, shall include all positive and negative findings pertinent to establishing the cause of death in accordance with the medicolegal practice and this, along with the written opinions and conclusions of the examining physician, shall be included in the coroner's record of death.....The coroner shall have the right to retain.....only those tissues...of the body... removed...at the time of the autopsy as may, in his or her opinion, be.....necessary or advisable to the inquiry into the case, .....or for the verification of his or her findings. No person may be present during the performance of a coroner's autopsy without the express consent of the coroner. (Emphasis added).

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ADDITIONAL PAGE

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## ANALYSIS

First, the rule clearly states that, the coroner shall have the right to retain "only those tissues", in the instant the entire heart organ was retained.

Every recognizable medical authority including the two statutes cited here make a distinction between the uses of the words tissues versus parts of the body. Further, the statute itself purports to limit the coroners' authority by the use of the words "The coroner shall have the right to retain only" before use of the words "those tissues".

Secondly, the statute says that a coroner may use his or her discretion only when it is "in his or her opinion, be necessary or advisable to inquiry into the case, or for the verification of his or her findings'. Discretion is not absolute the statute provides the Mandatory duty be for further inquiry or verification. The statute does not purport to give broad discretion in fact it limits the discretion to the two afore mentioned instances only.

In the instant, the coroner has given no indication that further inquiry was necessary, nor have any facts been shown to support the contention that a further verification of findings was underway. In fact the converse is true, as exemplified by Exhibit A – Pgs. 1-2. The cause of death was determined, the autopsy was over.

Thus, a Mandatory Breach of Cal. Gov. Code § 27491.4 (a) has occurred for two reasons. (1) The coroner retained the entire organ not just the tissue, (2) the cause of death had been established, no additional inquiry into the case was underway, no foul play was suspected or even mentioned, the discretion to retain is limited to further inquiry or verification only not for donative or scientific purposes under Cal. Gov. Code § 27491.4 (a).

Further, the autopsy report attached to this complaint as Exhibit A – Pg. 5 supports the above allegations of breach by the language contained in the report itself on page 5. The report states "Specimens are retained in 10% buffered formalin for diagnostic purposes". The detailed report goes on to distinguish the heart by categorizing the heart as a "cardiac specimen", nowhere in the report does it state that the entire organ was retained. The converse is true by the repeated usage of the words "specimens" and "sections", the report even goes so far as to list the "sections" retained. The words organs or body parts are not contained in the report at all. In addition, the report goes on to state that the "cardiac specimen" is being retained to "permit further detailed examination" this direct quote delineates the true intent for the retention of the heart "detailed examination" clearly points to scientific study not further inquiry and

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1 and verification which language is noticeably absent. This distinction highlights the allegation set forth in  
 2 this complaint that the heart was kept not for the purposes of further inquiry into the case, or for the  
 verification of findings "but for" scientific investigation and research. See Exhibit A –Pg. 5.

3  
 4 Additionally, if the standards set forth in California Government Code § 27491.45(a)(2) are applied to the  
 facts of this case a Breach of a Mandatory Duty has occurred.

5 California Government Code § 27491.45(a)(2) provides in pertinent part:

6 (a)(2) Parts of the body retained pursuant to paragraph (1) may be released by the coroner to hospitals,  
 7 medical educational research institutions, and law enforcement agencies for noncoroner training,  
 educational, and research purposes, either upon consent of the decedent or other person, as specified in  
 8 Section 7151 of the Health and Safety Code, or after a reasonable effort has been made to locate and  
 inform persons listed in subdivision (a) of Section 7151 of the Health and Safety Code of their option to  
 9 consent or object to the release, and the appropriate person consents or the effort has been unsuccessful. A  
 10 reasonable effort shall be deemed to have been made when a search for the persons has been underway for  
 at least 12 hours. The search shall include a check of local police missing persons records, examination of  
 11 personal effects, and the questioning of any persons visiting the decedent before his or her death or in the  
 12 hospital, accompanying the decedent's body, or reporting the death, in order to obtain information that  
 13 might lead to the location of any persons listed in subdivision (a) of Section 7151 of the Health and Safety  
 Code.

14  
 15 Breach of Mandatory Duty is shown by the facts of this case as demonstrated by Exhibit A – Pg. 1. The  
 plaintiff, who falls in the category of specified persons listed in Section 7151 of the Health and Safety  
 16 Code, was not informed of the removal or retention of the decedent's heart at the time of autopsy. Nor was  
 she given the opportunity to consent or object to the release of the heart to Stanford University. See  
 17 generally, Declaration of Isolina Picon.

18  
 19 Here, no facts have been provided by the San Mateo County Coroner, or anyone in his employ that would  
 indicate that further coronary investigations were underway. Nor have any facts been provided that would  
 20 counter the plaintiffs assertions that she was informed that the heart was removed and retained for the  
 express purpose of sending it to Stanford University for scientific research. The fact that the plaintiff was  
 21 informed that the heart was retained for scientific investigation and or research takes the actions of the  
 coroner beyond the scope Cal. Gov. Code § 27491.4 (a).  
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## COMPARE

The two Cal. Gov. Code §§ 27491.4(a), 27491.45(a)(2) were intentionally written to be separate and distinct. If a careful analysis of the two Code sections is made it becomes readily apparent that the two Code sections are quite distinguishable. A few facts that support this proposition are:

(1) being the use of the words “only those tissues” in Cal. Gov. Code § 27491.4(a) versus the use of the words “parts of the body” in Cal. Gov. Code § 27491.45(a)(2),

(2) being the granting of discretion for retention for further inquiry and verification Cal. Gov. Code § 27491.4(a) versus the right to retain for the purposes of scientific investigation and research Cal. Gov. Code § 27491.45(a)(2),

(3) the fact that Cal. Gov. Code § 27491.45(a)(2), clearly states that if the purpose of removal and retention of organs was for scientific research or investigation an attempt at contacting the next of kin for permission has to be made. This requirement for attempting to notify next of kin relates to the removal of body parts for the purpose of “noncoroner training, educational, and research purposes, either upon the consent of the decedent or other person, as specified in Section 7151 of the Health and Safety Code”. Cal. Gov. Code § 27491.45(a)(2), *supra*.

The fact that the plaintiff was given the cause of death at the conclusion of the autopsy on October 26, 2006, coupled with the fact that the body was released for burial on the same day clearly contradicts any assertions made by the coroner or any persons in his employ that further detailed inquiry or verification was underway to support his findings.

Therefore, the assertions made by plaintiff in this verified complaint that the heart of her deceased son was retained for scientific research due to his heart condition demonstrate a clear breach of a Mandatory Duty on the part of the defendants when she was not notified by the San Mateo County Coroner’s office at the time the heart was retained on October 26, 2006. The fact that the heart was retained without an attempt at prior consent for scientific purposes, notwithstanding its eventual return establishes breach for purposes of California Government Code § 815.6.

The Coroner’s office retained the entire organ without any attempt to notify the decedent’s relatives. The Coroner’s office retained the entire heart despite the fact that no “reasonable effort has been made to locate and inform next of kin of their option to make, or object to making, an anatomical gift.” Cal. Health & Safety Code § 7151.5(a)(2). Yet, another Mandatory Duty Breached by the defendants San Mateo County Coroner.

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On November 13, 2006 two weeks after what the plaintiff believed was the burial of her son, she found out that the Coroner's office had retained her son's entire heart organ. The plaintiff was told that the heart had been sent to Stanford University for research purposes. When the plaintiff was given this information, in addition to being completely shocked, dismayed and outraged, she questioned the rights of the Coroner to give away or sell her son's entire heart without her permission. She was told that the law did not require her permission to retain the organ. After being told that her son's heart was not with his body when he was buried the plaintiff began what could only be categorized as a crusade to regain possession of her son's heart. The plaintiff was ultimately successful in doing so on November 21, 2006. The agony she felt from the sudden death of her son was inextricably exacerbated upon stumbling on the knowledge that his body was not intact at burial. The fact is that the defendants literally stole the heart of the decedent Nicholas Picon.

In doing so the defendants and each of them breached their mandatory duty owed to plaintiff within the meaning of Government Code Section 815. 6. This duty was breached when the County Coroner retained the heart of the decedent and failed to comply with applicable rules, including but not limited to the rules set forth in California Government Code Sections 27491.4 (a) and 27491.45 (a) (2), and Health and Safety Code commencing with Section 7150.

Whether a statute "creates a mandatory duty is a question of law" for the courts. Creason v. Department of Health Services (1998) 18 Cal.4th 623, 631.

Statutory interpretation involves a three step analysis. "First, a court should examine the actual language of the statute. Judges, lawyers and lay people all have far readier access to the actual laws enacted by the Legislature than the various and sometimes fragmentary documents shedding light on legislative intent. More significantly, it is the language of the statute itself that has successfully braved the legislative gauntlet. It is that language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor. The same care and scrutiny does not befall the committee reports, caucus analyses, authors' statements, legislative counsel digests and other documents which make up a statute's 'legislative history.' In examining the language, the courts should give to the words of the statute their ordinary, everyday meaning unless, of course, the statute itself specifically defines those words to give them a special meaning. If the meaning is without ambiguity, doubt, or uncertainty, then the language controls. But if the meaning of the words is not clear, courts must take the second step and refer to the legislative history. The final step--and one which should only be taken when the first two steps have failed to reveal clear meaning--is to apply reason, practicality, and common sense

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1 to the language at hand. If possible, the words should be interpreted to make them workable and  
 2 reasonable." Halbert's Lumber, Inc. v. Lucky Stores, Inc. (1992) 6 Cal.App.4th 1233, 1238-1240.

3  
 4 The breach of the enumerated Mandatory duties owed to plaintiff is clear by the language of Cal. Gov.  
 5 Code §§ 27491.4(a), 27491.45(a)(2). Tissues not organs may be removed to verify the circumstances  
 6 surrounding the cause of death. Parts of the body may be retained to provide scientific and educational  
 7 research only if an attempt at notification of next of kin is made. Further the fact that Cal. Gov. Code §§  
 8 27491.45(a) was amended in 1998 and 2000, requiring the coroner to at least make an attempt to obtain  
 9 permission before allowing a body part removed and retained at the time of an autopsy released for  
 10 scientific investigation or research supports the plaintiffs allegations for breach.

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## THIRD CAUSE OF ACTION

## NEGLIGENCE

On October 26, 2006 the San Mateo County Coroner's office conducted an autopsy on the remains of Nicholas Picon.

At some point during the autopsy or at the conclusion of the autopsy the Coroner made the decision to remove and retain the entire heart organ of the decedent without prior consent, notification, or permission by the next of kin.

The Coroner in his official capacity had a duty owed to the plaintiff as next of kin.

The duty began when the Coroner took possession of the remains of the decedent.

This duty was breached when the remains were returned to the plaintiff without the heart organ.

The knowledge that her son's heart was stolen by the Coroner has caused and will continue to cause the plaintiff severe emotional distress.

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## FOURTH CAUSE OF ACTION

## UNCONSTITUTIONAL DEPRIVATION OF PROPERTY

## UNDER 42 U.S.C.S. § 1983

The Fourteenth Amendment prohibits states from depriving any person of life, liberty, or property, without due process of law. The United States Constitution Amendment XIV, § 1.

At the threshold, a claim under 42 U.S.C.S. § 1983 for an unconstitutional deprivation of property must show (1) a deprivation, (2) of property, (3) under color of state law. If these elements are met, the question becomes whether the state afforded constitutionally adequate process for the deprivation. California Courts commonly use the term “quasi property” to describe the rights of next of kin to the body of the deceased.

Under California law the violation of the correlative duty of others to refrain from disturbing the body is subject to an action for “tortuous interference with a right to dispose of a decedent’s remains.” *Newman v. Sathyavaglswaran* (9th Cir. 2002) 287 F. 3d 786, 789-800. In the instant case, the deceased son of the plaintiff had his entire heart organ retained after an autopsy determined his cause of death. Further, the plaintiff was told the cause of death and buried what she believed to be her son’s intact remains.

If this court rejects the allegations presented in the preceding causes of action then it will be rejecting them under color of state law.

California Government Code § 27491.4(a) states in pertinent part:

(a) For purposes of inquiry the coroner shall, within 24 hours or as soon as feasible thereafter, where the suspected cause of death is sudden infant death syndrome and, in all other cases, the coroner may, in his or her discretion, take possession of the body, which shall include the authority to exhume the body, order it removed to a convenient place, and make or cause to be made a postmortem examination or autopsy thereon, and make or cause to be made an analysis of the stomach, stomach contents, blood, organs, fluids, or tissues of the body. The detailed medical findings resulting from an inspection of the body or autopsy

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by an examining physician shall be either reduced to writing or permanently preserved on recording discs or other similar recording media, shall include all positive and negative findings pertinent to establishing the cause of death in accordance with the medicolegal practice and this, along with the written opinions and conclusions of the examining physician, shall be included in the coroner's record of death.....The coroner shall have the right to retain.....only those tissues...of the body... removed...at the time of the autopsy as may, in his or her opinion, be.....necessary or advisable to the inquiry into the case, .....or for the verification of his or her findings. No person may be present during the performance of a coroner's autopsy without the express consent of the coroner. (Emphasis added).

California Government Code § 27491.45(a)(2) provides in pertinent part:

(a)(2) Parts of the body retained pursuant to paragraph (1) may be released by the coroner to hospitals, medical educational research institutions, and law enforcement agencies for noncoroner training, educational, and research purposes, either upon consent of the decedent or other person, as specified in Section 7151 of the Health and Safety Code, or after a reasonable effort has been made to locate and inform persons listed in subdivision (a) of Section 7151 of the Health and Safety Code of their option to consent or object to the release, and the appropriate person consents or the effort has been unsuccessful. A reasonable effort shall be deemed to have been made when a search for the persons has been underway for at least 12 hours. The search shall include a check of local police missing persons records, examination of personal effects, and the questioning of any persons visiting the decedent before his or her death or in the hospital, accompanying the decedent's body, or reporting the death, in order to obtain information that might lead to the location of any persons listed in subdivision (a) of Section 7151 of the Health and Safety Code.

Plaintiff has alleged with specificity that (1) §§ 27491.4(a) & 27491.45(b) impose a mandatory duty on the coroner, (2) the complaint also established that the plaintiff has standing by citing Section 7151 of the Health and Safety Code, which describes the category of specified persons the statute was intended to protect, and (3) the complaint sets forth the breach of statute's mandatory duty as being the proximate cause of the injury suffered.

Here, the San Mateo County Coroner deprived the plaintiff Isolina Picon of the heart of her deceased son for nearly thirty days. The actions of the County Coroner caused a deprivation of the plaintiffs' property

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1 without due process of law in violation of the Fourteenth Amendment. The heart was retained without the  
 2 knowledge of the plaintiff and without an attempt to notify her and request consent to retain the organ for  
 3 scientific purposes.

4 42 U.S.C. 1983 states, in relevant part:

5 Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or  
 6 Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States  
 7 or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities  
 8 secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,  
 9 or other proceeding for redress.....

10 Therefore, if the standards set forth in California Government Code §§ 27491.4(a), and 27491.45(b) allow  
 11 the San Mateo County Coroner to deprive the plaintiff of her property interest in the remains of her  
 12 deceased child a violation of the Fourteenth Amendment has occurred and the County and the Coroner are  
 13 liable to the plaintiff in an action at law, suit in equity, or other proceeding for redress Under the  
 14 Constitution Of The United States.

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PLD-PI-001(6)

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**Exemplary Damages Attachment**Page 16ATTACHMENT TO ☒ Complaint ☐ Cross - Complaint

EX-1. As additional damages against defendant (name):

**ROBERT FOUCRAULT individually and as Coroner San Mateo**

Plaintiff alleges defendant was guilty of

- ☒ malice  
☒ fraud  
☒ oppression

as defined in Civil Code section 3294, and plaintiff should recover, in addition to actual damages, damages to make an example of and to punish defendant.

EX-2. The facts supporting plaintiff's claim are as follows:

**This Exemplary Damages Attachment incorporates each of the preceding causes of action not negligence as though set forth in full.**

**On October 26, 2006 the San Mateo county coroner's office conducted an autopsy on Nicholas Picon. Nicholas Picon was the natural born son of the plaintiff Isolina Picon.**

**On October 26, 2006, the Coroner's office of San Mateo County told the plaintiff that the remains of her son Nicholas Picon were released to the funeral home.**

**On October 30, 2006, plaintiff buried what she thought was the intact remains of her son Nicholas Picon.**

**On November 13, 2006, plaintiff found out that she had not buried her son's body intact. The same day plaintiff requested an autopsy report.**

**On November 14, 2006, plaintiff went to the district attorney's office in person to report the theft of her son's heart.**

**On November 16, 2006, plaintiff was informed that the coroner had the legal rights to the heart that the law vested the authority in the Coroner solely to determine the disposition of deceased remains.**

**Only after repeated phone calls and pleas for the return of her son's heart did the plaintiff regain possession of the heart on November 21, 2006, at 5:30 pm.**

**Plaintiff was misled to believe that she had been given her son's remains. Plaintiff was intentionally misinformed by the county coroner and county counsel about the law as it pertains to organ retention. Plaintiff was forced to make repeated attempts to regain custody of her son's stolen heart through numerous pleas and calls.**

**The Coroner's office intentionally released the plundered body of Nicholas Picon to the funeral home without notifying the next of kin that the entire heart organ was retained.**

**The plaintiff was reduced to daily begging from November 13 - November 21, 2006, the time period between the knowledge of the theft and the recovery of the heart organ.**

**Plaintiff was repeatedly and callously, rebuffed, turned away, and given false information during the aforementioned time period.**

EX-3. The amount of exemplary damages sought is

- a. ☒ not shown, pursuant to Code of Civil Procedure section 425.10.  
b. ☐ \$

MC-031

PLAINTIFF/PETITIONER: Isolina Picon	CASE NUMBER:
DEFENDANT/RESPONDENT: County of San Mateo; Robert Foucault	

**DECLARATION***(This form must be attached to another form or court paper before it can be filed in court.)***VERIFICATION**

I, Isolina Picon hereby declare, that my son Nicholas Picon died in our home on October 25, 2006. I was informed on October 26, 2006 that my son died of a congenital heart defect called intramural tunneling of the heart I was given this information by the San Mateo Coroner's office at the conclusion of his autopsy. I buried what I believed at the time to be the intact remains of my son on October 30, 2006. The funeral gave me a sense of purpose in that I was honoring my sons' remains and laying him to rest. It was the start of what I thought at the time to be the process of closure.

I was heartbroken at the loss of my son but I knew that I had to be strong for my family especially my husband and my daughter. I reasoned that due to that fact that my son died of natural causes in his own home that while tragic it was as peaceful a way to depart this earth as I could imagine otherwise.

I began to cope with my grief by seeking out my sons' friends and others who had suffered similar loss. It was during this search for answers and guidance that I stumbled upon the gross discovery that the San Mateo County Coroner's office had unbeknownst to me "stolen" the heart of my son, literally taking it from his body. This news completely rocked me to the core. It literally brought me to my knees. It destroyed me. I have not been the same person since finding out this information. As if finding out the information could have been any worse I was then forced to quite literally "beg" and plead with the San Mateo County Chief Deputy Coroner Thomas Marriscolo to return my sons heart to me. I cried. I pleaded with him and he keep telling me that I could not have my son's heart back. He told me that it had been sent to Stanford University for studying, he told me that I could not have it for health and safety reasons, he told me that I would have to pay to have my sons body exhumed and have the heart put back with the rest of his remains. He very coldly said that I could not have my son's heart back and that he would not speak to me again until he spoke with County counsel and then he hung up the phone abruptly in my face!

Still I begged, still I pleaded and finally on November 21, 2006, over a week later my sons' heart the heart that I nurtured and grew in my own womb was returned to me. The entire ordeal has caused me to have nightmares about my sons' heart being ripped from his body, callously stored and other outrageous thoughts that I cannot even begin to describe.

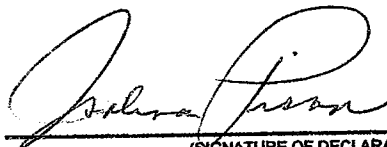
One of them being the fear that the heart that I was given is not my son's heart at all.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: October 23, 2007

Isolina Picon

(TYPE OR PRINT NAME)



(SIGNATURE OF DECLARANT)

☐ Attorney for    ☐ Plaintiff    ☐ Petitioner    ☐ Defendant  
☐ Respondent    ☒ Other (Specify):  
**PLAINTIFF**

# **EXHIBIT A**

**SAN MATEO COUNTY CORONER'S OFFICE**

**PATHOLOGY REPORT**

CASE No. 06-2533-A

NAME: PICON, Nicholas

SEX: Male

AGE: 23 years

Death Time & Date: Pronounced 1640 hours, 10-25-06

Time & Date of Exam: 0830 hours, 10-26-06

Autopsy Surgeon: Peter A. Benson, M.D., performed at San Mateo Medical Center,  
222 W. 39th Avenue, San Mateo, CA 94403

**CAUSE OF DEATH**

I. Disease or Condition directly leading to death:

A. Probable cardiac dysrhythmia

due to

B. Intramural tunneling of left anterior descending coronary artery

due to

C.

due to

D.

II. Other significant conditions contributing  
but not related to the immediate cause of death:

**DIAGNOSES:**

- I. Intramural tunneling of left anterior descending coronary artery (also called myocardial coronary bridging - up to 5 mm deep over a 20 mm tunnel)
- A. Focal fibrosis in right ventricular endocardium
- B. Sudden collapse per scene investigation, consistent with cardiac dysrhythmia -- moderate dilatation of right atrium

SEARCHED  
SERIALIZED  
INDEXED  
FILED  
TO ISOLINA PICON  
SAN MATEO COUNTY CORONER  
BY VJ DATE 11/27/06

[Continued]

## SAN MATEO COUNTY CORONER'S OFFICE

AUTOPSY REPORT

NAME: PICON, Nicholas

CASE No. 06-2533-A

**PROLOGUE:** Written information available to the Forensic Pathologist prior to the autopsy is contained in a six-page Investigation Report by Investigator Gamble. Also received with the body is a digital photographic disk.

This autopsy begins in the Coroner's morgue at San Mateo Medical Center at 0830 hours and concludes at 1000 hours, Thursday, October 26, 2006. Assisting at the autopsy is Holly Benedict, Forensic Autopsy Technician.

IDENTIFICATION

An identification tag present on the right foot is signed by Investigator Gamble ("Nicholas Picon").

EXTERNAL EVIDENCE OF THERAPEUTICS AND/OR ATTEMPTED RESUSCITATION

Four EKG electrodes are present on the trunk.

There is a 3 mm long pale linear scar below and lateral to the left kneecap.

EXTERNAL EXAMINATION

Present on a gurney in the morgue, and wrapped in a white plastic wrap, is the supine body of a white/Hispanic adult male whose appearance is consistent with the given age of 23 years. The body measures 66 inches in length and weighs 132 pounds (the length and net weight are determined by Holly Benedict, Forensic Autopsy Technician).

**Clothing:** None. The body is nude.

There is full rigor mortis. Postmortem lividity is noted in the posterior portions of the body.

San Mateo County Coroner's Office  
PICON, Nicholas  
Autopsy Report, Case No. 06-2533-A

1 On the face is a coating of white soap or lotion, now dried, located on the nose,  
2 cheeks, and chin. On the scalp is straight, black hair measuring up to 6 inches in  
3 length. On the face are a trimmed beard and moustache with the hairs measuring  
4 approximately 1/2 inch in length. The sclerae are white and irides are brown. The  
5 pupils are round and equal and each measures 5 mm in diameter. Rare bulbar  
6 conjunctival petechiae are seen bilaterally, but no petechiae are seen in the  
7 palpebral conjunctival surfaces, or the facial skin. No tache noire is seen on the  
8 bulbar surfaces. The jaws show natural teeth, the biting edges of which are  
9 separated approximately 1/2 inch apart. No bite marks are seen in the lips or  
10 anterior visible tongue. The nasal septum is grossly normal. The oral cavity is free  
11 of fluid or foreign material. The hard palate is noted to have a high arch. The  
12 earlobes are unremarkable. The trachea is in the midline. The chest hair is scanty  
13 but appears shaved. The abdomen is flat. No surgical scars are seen on the  
14 abdomen. The penis is uncircumcised. The testes are present within the scrotum.  
15 The fingernails are uniformly short and appear cut or bitten to the quicks. There is  
16 no clubbing of the digits. The posterior portions of the body are unremarkable. No  
17 pitting edema of the ankles is found.

18  
19 **EXTERNAL EVIDENCE OF INJURY**

20  
21 No injury is seen. No recent or old needle puncture mark is identified.  
22

23  
24 **INTERNAL EXAMINATION**

25  
26 Following the external examination, the body is opened with the usual Y-shaped  
27 incision. The color of the skeletal muscles is unremarkable. The ribs are intact and  
28 the pleural cavities are unremarkable. There is no evidence of pneumothorax or  
29 pleural effusions. The pre-peritoneal fat measures 3/4 of an inch in thickness, two  
30 inches below the level of the umbilicus. The peritoneal surfaces are normal. The  
31 spinal column appears normal.

32  
33 **INTERNAL EVIDENCE OF INJURY**

34  
35 No traumatic injuries are seen in the internal organs.  
36

37 **INTERNAL EVIDENCE OF THERAPY**

38  
39 None is seen.  
40  
41

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1 **SYSTEMS EXAMINATION**

2  
3 **THYMUS:** The thymus, which overlies the great vessels at the base of the heart,  
4 weighs 50 grams. There are numerous scattered tiny petechiae-like hemorrhages  
5 throughout the thymus.

6  
7 **HEART:** The pericardial and epicardial surfaces are smooth and glistening.  
8 Within the pericardial sac are 20 mL of clear straw-colored fluid, which is  
9 removed and discarded. The pulmonary artery is opened in situ and palpated for  
10 thromboemboli and none is found. The right atrium appears moderately dilated.  
11 Blood is aspirated from the right side of the heart for a toxicologic sample. The  
12 heart weighs 300 grams. The predicted normal heart weight based on sex and  
13 height is 308 grams (range 218 to 435 grams) and based on sex and weight is 302  
14 grams (range 229 to 399 grams).<sup>\*</sup> The coronary arteries originate normally from  
15 the aorta; they are sectioned at closely-placed intervals revealing small vessels  
16 without evidence of calcification, atherosclerosis, mural hemorrhage, or luminal  
17 thrombus. The left anterior descending artery is noted to tunnel into the muscle of  
18 the anterior wall of the left ventricle over a 20 mm length, and up to 5 mm in  
19 depth near the central portion of the tunnel. The heart is opened along the flow of  
20 blood. The right ventricle measures up to 3 mm and the left ventricle measures up  
21 to 15 mm in thickness. The heart valves are unremarkable. The heart valve  
22 circumferences measure as follows: tricuspid 12.5 cm, pulmonic 7 cm, mitral 8.5  
23 cm, and aortic 5.5 cm. There is no evidence of rheumatic disease, mitral prolapse  
24 or vegetations. The endocardial surfaces are smooth and glistening. The  
25 myocardium is normal, with no gross evidence of necrosis or scarring. No  
26 auricular or endocardial clots are seen. The foramen ovale is closed.

27  
28 The formalin-fixed heart is re-examined on 10-29-06, and two Polaroid  
29 photographs are taken. Below the pulmonary valve, the anterior wall of the right  
30 ventricle shows a pocket-like diverticulum. The opening measures 7 x 12 mm, and  
31 the pocket is 15 mm deep. This diverticulum is located beneath the course of the  
32 right coronary artery. Also noted is a 5 mm patch of endocardial fibrosis on the  
33 septal wall of the right ventricle near the apex.

34  
35 **LUNGS:** The right lung weighs 310 grams and the heavier left lung weighs 370  
36 grams. Both lungs show pink and crepitant parenchyma in the anterior portions  
37 and a slight degree of generalized congestion which is most prominent in the  
38 posterior dependent portions. There is a slight degree of irregularity in the aeration

---

<sup>\*</sup> Reference: Mayo Clinic Proceedings 63: 1237 - 1246, 1988. Kitzman, D. et al. Age-related changes in normal human hearts during the first 10 decades of life, Part II (Maturity): A quantitative anatomic study of 765 specimens from subjects 20 to 99 years old.

San Mateo County Coroner's Office  
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1 of the anterior portion of the right lung. There is spotty black anthracotic pigment  
2 over the pleural surfaces of both lungs. No discrete area of consolidation is found.  
3 There is no evidence of aspiration of gastric contents. The bronchial tree is free of  
4 fluid or foreign material. No thromboembolus is seen. The hilar lymph nodes are  
5 grossly unremarkable. No aromatic or alcohol-like odor is detected.

6  
7 **NECK ORGANS:** The neck organs are examined towards the conclusion of the  
8 autopsy and they appear grossly normal. The thyroid gland is normal in size and  
9 shape, and the airway is clear. The hyoid bone, thyroid cartilage and cricoid  
10 cartilage are intact. The carotid arteries are left intact at the conclusion of the  
11 autopsy to assist the mortician. The cervical spine is grossly intact. The strap  
12 muscles of the neck are atraumatic.

13  
14 **LIVER:** The liver weighs 1400 grams. The liver is grossly normal.

15  
16 **GALLBLADDER:** The gallbladder and bile ducts are grossly normal. There is  
17 no evidence of gallstones or duct obstruction.

18  
19 **SPLEEN:** The spleen weighs 180 grams. The spleen shows unusual lobulation  
20 with several triangular depressions of the capsule resulting in "dog-ear"-like  
21 triangular lobes. The capsule is thin and intact, and the parenchyma has a uniform  
22 dark red color and normal consistency.

23  
24 **PANCREAS:** The pancreas is unremarkable. There is no evidence of hemorrhagic  
25 inflammation, fat necrosis or calculi.

26  
27 **GASTROINTESTINAL TRACT:** There is no palpable evidence of a hiatus  
28 hernia. The esophagus is normal. Within the stomach are approximately 15 grams  
29 of mucoid fluid. No pills or capsules are seen and there is no chemical gastritis.  
30 The mucosal surfaces of the esophagus, stomach, and duodenum are intact. No  
31 ulcer or ulcer scar is seen and there is no gross evidence of gastrointestinal  
32 bleeding. The small intestine, appendix and large intestine are unremarkable. No  
33 intestinal foreign body is detected.

34  
35 **ADRENALS:** The adrenal glands are grossly normal in size, shape, and color.

36  
37 **UROGENITAL SYSTEM:** The right kidney weighs 110 grams and the left  
38 kidney weighs 150 grams. The thin capsules strip with ease from the smooth renal  
39 surfaces. Both kidneys show a moderate degree of generalized congestion. The  
40 ureters are normal in caliber. The urinary bladder contains approximately 50 mL

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Autopsy Report, Case No. 06-2533-A

1 of yellow urine. A Bayer Diastix is negative for glucose. The prostate and testes  
2 are grossly normal.

3  
4 **AORTA:** The aorta is unremarkable.

5  
6 **CENTRAL NERVOUS SYSTEM:** By means of a bi-temporal incision, the scalp  
7 is reflected. There is no evidence of scalp trauma and specifically, no bruise is  
8 seen in the posterior neck or occipital areas. There is no evidence of skull fracture  
9 and the dura is subsequently stripped from the internal aspect of the skull for  
10 confirmation. The calvarium is removed in the usual fashion by the Forensic  
11 Autopsy Technician. The calvarium is normal in color, thickness, and consistency.  
12 The brain weighs 1380 grams. The cerebellum and brainstem contribute 200  
13 grams to the total brain weight. The dura and leptomeninges are unremarkable.  
14 The arteries at the base of the brain are thin and delicate. The brain is symmetrical  
15 and shows no focal lesions. There is no herniation of the cerebellar tonsils or unci.  
16 The brain is sectioned in the fresh state by means of closely-placed coronal  
17 sections and no unusual features are detected. There is no evidence of  
18 hydrocephalus. The substantia nigra is normally pigmented. The pituitary gland is  
19 unremarkable. The foramen magnum and dens are grossly normal.

20  
21 **DIAGRAMS ATTACHED**

22  
23 One-page.

24  
25 **TISSUE SPECIMENS**

26  
27 Specimens are retained in 10% buffered formalin for diagnostic purposes. The  
28 cardiac specimen is retained to permit further detailed examination.

29  
30 Sections taken on 10-29-06:

- 31  
32 1. Tunneled left anterior descending coronary artery  
33 2. Right ventricular endocardium  
34 3. Right and left ventricular myocardium  
35

36 **PHOTOGRAPHS**

37  
38 An identification Polaroid photograph is taken by the Forensic Autopsy  
39 Technician and sent to the Coroner's Office. Two Polaroid photographs of the  
40 heart are taken on 10-29-06.  
41

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Fax (415) 464-4975

Attorney for PETITIONER,  
ISOLINA PICON

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**IN AND FOR THE COUNTY OF SAN MATEO**

ISOLINA PICON,

Petitioner,

vs.

COUNTY OF SAN MATEO, ROBERT

FOUCRAULT, individually and as Coroner

Respondent

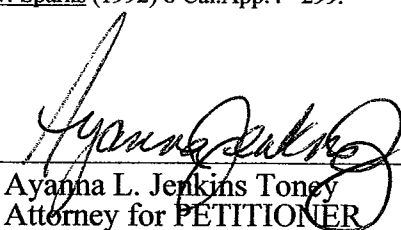
Case No.: CIV 467161

NOTICE OF UNAVAILABILITY OF  
COUNSEL

Notice is hereby given to the above referenced COURT and OPPOSING COUNSEL that commencing on February 4, 2008 and continuing through February 15, 2008, the Law Offices Of Ayanna L. Jenkins Toney, Esq. will be closed and counsel will not be available for any purpose whatsoever, including but not limited to receiving notices of any kind, appearing in court, receiving service of discovery, responding to ex parte applications, attending depositions, or any other matter requiring counsel's personal attendance.

I respectfully request that the above-entitled court take notice of this unavailability. Purposefully scheduling a conflicting procedure without good cause is sanctionable conduct. Tenderloin Housing Clinic v. Sparks (1992) 8 Cal.App.4<sup>th</sup> 299.

Dated: January 28, 2008

  
Ayanna L. Jenkins Toney  
Attorney for PETITIONER

PROOF OF SERVICE

{C.C.P. 1013a}

I declare that I am over the age of 18 years and that I am not a party to this action. My address is: 700 Larkspur Landing Circle, Suite 199, Larkspur , CA 94939. On JANUARY 28, 2007, I served the following document(s) described as:

**PLAINTIFFS AMENDED COMPLAINT; NOTICE OF UNAVAILABILITY OF COUNSEL; REQUEST FOR REMOVAL OF DEMURRER FROM CALENDAR**

(XXX ) **BY MAIL**, causing each such envelope, with first class postage thereon fully prepaid, to be deposited in a U.S. Post Office mailbox at Larkspur, California, for collection and mailing at the address below.

MICHAEL P. MURPHY, COUNTY COUNSEL  
HALL OF JUSTICE AND RECORDS  
400 COUNTY CENTER, 6<sup>TH</sup> FLOOR  
REDWOOD CITY, CA 94063

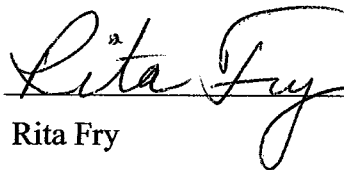
( ) **BY PERSONAL DELIVERY**, personally delivering an envelope with a copy of the forgoing documents sealed therein to the addressee(s) at the address set forth below as follows:

**Date:**

**Time:**

(X XX ) **BY FACSIMILE**, sending through facsimile transmission a true copy thereof to the person at the fax number set forth below. The transmission was reported as complete and without error. (650) 363-4034

I Rita Fry, declare under penalty of perjury under the laws of the State of California that the foregoing is in my personal knowledge and is true and correct, except as to matters alleged on information and belief, and as to those matters I believe them to be true. If called to testify I would relate the same information. Executed this 28<sup>th</sup> day of JANUARY, 2008, in Larkspur, California.

  
Rita Fry